

THE LAW RELATING TO EMPLOYMENT IN INDUSTRIAL ESTABLISHMENTS A STUDY WITH SPECIAL REFERENCE TO INDIA

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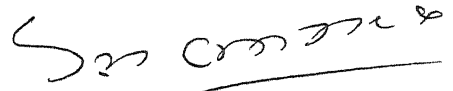


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Certified that the work entitled "The Law Relating to Employment in Industrial Establishments A Study with Special Reference to India" is the original work of Sri Shyam Sunder Misra, carried under my personal supervision

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PREFACE

The causes for industrial dissensions and sick units in India may be so many, but one of them is definitely a bad policy towards the workers. The attitude of workers towards the employers and that of the employers towards the workers seem to be enmity and unfriendly and the worksite becomes a battle ground even on a flimsy provocation. Industrialists employers admit that the biggest problem before them happens to be workers - problem : their attendance, discipline, and work culture. In spite of double the strength of the workers an assigned task takes more time than normally it should take, thus escalating the cost of the article produced. Workers also complain of less wages, bad facilities of worksite and a feudal lordlike behaviour of the employer. This clash of interests seems perennial, but a polished, compromising adjusting midway is always possible within a legal framework of contract of Employment² with a democratic and progressive outlook. This is precisely the solution endeavoured in this thesis for the peaceful industrial efforts aiming at the progressive production, full employment, and prosperity of the workers and the Nation.

The coverage of cases in this work has been upto 1994 and English cases have been referred wherever it was felt necessary to distinguish the Indian position but they have not been fully discussed barring a few of them.

The first chapter of this study deals with the introduction and delimits the vast kinds of workers who shall be covered under the plan of study specifying the industrial employment in the Law of Employment.

The second chapter concerns with conceptual frame-work tracing the historical evolution of the Concept of Law of Employment in India. The two tier theory of contract of employment as propounded by Dr M.R.Freedman in 1976 and seconded by Dr Patrick Eliás in 1982 had already been given a new dimension by adding a third tier in 1981 by this writer, finds a thorough thrashing as well in the second chapter together with the differentiation of contract for employment and contract of employment and difference between industrial worker and non-industrial worker detailing the modern concept of employment where role of Risk Management and developments in technology can not be ignored.

The third chapter deals with the formation of the terms of the contract wherein implied terms and express terms of the contract of industrial employment as the duty of the employer towards the workers while he is in active service as well as after his retirement together with the duties of the workers towards the employers and the concern while they are actively engaged during their service tenure and also beyond that when the workers become as ex-employees have been discussed.

The fourth chapter contains the legislative response to industrial employment law in India together with the concept of job - security, trying to find whether job - security enhances efficiency. The New Economic policy as pursued by the Government of India since 1991, and its influence on the industrial employment in India has also been discussed.

The fifth chapter analyses the concept of collective bargaining and its effect on the industrial employment, while the sixth chapter covers the role, impact and nurturing of ILO on the Indian Industrial Employment

The seventh chapter deals with the judicial response to the industrial employment law in India covering the different dimensions and aspects of the industrial employment together with judicial activism and the Public Interest Litigation (PIL) on the subject

The last chapter VIII, contains the conclusions recommendations and suggestions

I hope the suggestions would prove practical and be of utility to buttress the cause of industrial peace, progress and prosperity of the workers, employers and ultimately the Nation

The credit for completion of this work goes to my guide Professor S.N.Misra, Department of Law, University of Allahabad who has helped me a lot and I acknowledge my heartfelt gratitude and thanks to him Dr J.N.Pandey, Reader Department of Law, University of Allahabad has also been a source of suggestions, discussions and inspiration and I acknowledge to him my sincere thanks Other Faculty members of my department have also encouraged me to complete this work, because at the fagend of my career, sometimes I felt depressed and disillusioned but because of their well wishing and inspiration I carried on, I extend my thanks to them all

I am deeply touched by the considerate attitude of my wife, who kept me free from house-hold affairs by aptly managing this front giving a congenial atmosphere for the completion of this work. She deserves all praise and I extend my thanks to her also.

I acknowledge my thanks to the Library Staff of my Departmental Library, University of Allahabad and Departmental Library of Law School, B.H.U. and Law Library of University College of Law, Calcutta University at Darbhanga Building Campus as well as Hazra College Law Campus. I also extend my thanks to the staff of the Library of Indian Law Institute, New Delhi and the National Library Calcutta for their cooperation and help.

Once again I express my gratitude to Professor S.N.Misra whose guidance has enabled me to complete this work.

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INTRODUCTION

Industry and industrial development are like the spine of the Economy of a country irrespective of its system of Government. The industrial achievement of a country is treated as a barometer of its progress, prosperity and wellbeing. A progressive peace at industrial front is the desired goal of every country so that uninterrupted production, Trade (Commerce) and generation of avenues of employment may ensue.

Though, India is, basically an agricultural country, yet, industrially it is not lagging behind¹, because of impact of five year plans² and Technological explosion. The Technological progress has its impact world over.

The industries in India may be grouped broadly in two categories viz Public Sector and Private Sector including small scale cottage industries. The workers who sell their labour and skill in these industries may also be categorised broadly in two groups viz organized workers and unorganised workers. Organised workers, are found usually at big industrial concerns in Public as well as Private Sector units. This categorisation shows existence of different conditions among workers qua industries and as such affecting the contract of industrial employment.

In order to achieve the desired result in industrial production, the forces of capital, Land, Labour and enterpremanship

1. See Institute of Public Enterprises Research Bulletin 6-1990, University of Allahabad, p.6, 13A. The position of Public enterprises as on 31.3.89 was ;

Capital invested ; 85,564 Cr
Total number of Public Enterprises - 254
Number of Employees - 2208470

2. Seven Five Year Plans already implemented, 8rth is in vogue.

must combine, though these different forces may have different motives. The capital forces desire to exact maximum profits even at the cost of workers interests as lesser payment to the worker enhances the quantum of their profits. The workers, on the other hand, demand their share of toil which is to them in the shape of wages, allowances and certain perks, seemingly inadequately paid in the eyes of the workers, while adequate and enough in the opinion of the capitalists — The employer So, at every industrial unit, this class struggle goes on constantly. Periodically, on ad-hoc basis some chips are granted to these teeming millions of workers force so that their toil and labour may remain available. No attempt is made for a durable and just solution of this problem. So, usually this breeds industrial unrest in the shape of various kinds of strikes and lockouts causing disruption in the production leading to the national loss and danger to the economy of the country.

The relationship of employer and worker needs a proper regulation, control, direction and trimmings This relationship of the employer and the worker by which the worker sells his labour and skill in the process of production and its allied activities in an industrial unit may be called industrial employment. Likewise an industrial unit is a worksite where through concerted efforts of at least ten people, some process of production and its allied activities are carried on The Expression 'industry' covers

" branches of work that can be said to be analogous to the carrying out of a Trade or business",

as held by the Supreme Court in Bangalore water supply case.³ Use of power and machines will decide the size of the unit and quantum of the production and profit. The wheels of industrial production must not stop. Its stoppage is termed as industrial unrest caused by usually labour trouble or rarely by economic depression or sickness.

a) Industrial peace and Contract of Employment :

Industrial peace with rapid production and all round development remains a goal to be achieved by every country and by developing countries in particular. There may be hundreds of causes for industrial unrest and different remedies, for their solution, but nobody has cared to locate the most potential cause of industrial unrest which centres round the human nature, behaviour and surrounding responses of the participants of the production processes. The employer and employee happen to be the human factor besides the machinery, raw material, energy, transport etc. as the subsidiary agents of the production process. This may be said to be the picture of the elementary stage of industrial production and organizational development. After the advent of the technological explosion, the 'Automation process of production' and use of Robots and 'Computers' have a distinct impact on the whole participation processes of industrial production whereby a reduction in the human share of participation has occurred. But in India, still there is scope for the human agents as a worker to participate in the production processes of industrial activities - because of a mammoth population and developing stage of industrial progress.

3. Bangalore water supply and sewerage Board V A.Rajappa, A.I.R. 1978. S.C. 548

To ensure peace at industrial front, the contract of employment has an effective role to play, provided it is implemented bonafide. All disputes between the workers and the employers mainly arise due to dissatisfaction over the terms and conditions of employment such as raising of wages, allowances and certain basic amenities concerning safety, health and welfare of the workers. In practice, the management curtails these expenditures as a matter of economy at the cost of worker's health and safety. Thus, the demand by worker for more amenities and the capitalists interests to produce low cost goods, happens to be the main cause of dispute between the workers and their employers. The solution of this problem in the frame work of law lies, at the first step, in the shape of proper caring of a worker from the very entry point, i.e. when he enters into the processes of production, he should be there only after proper screening and after that his proper caring must ensue.

b) Industrial peace keeping through clash of Interests :

The worker sells his labour and skill in exchange of wages. The wages is given when the labour of the worker gets a tangible shape. The rate of wages depends upon many factors and may be different for different categories of workers. This categorisation of workers is done on the basis of expertise, skill, loyalty punctuality, quantum of production and the duration of time a worker has deployed himself at the employer's organisation.

Thus employer assigns tasks and workers fulfil them. As such a rotation is established under the employment which must continue.

It seems simple If daytoday obligations of both the parties are properly fulfilled, usually this rotation goes on and runs smoothly But workers simple physical presence is not enough. They must work also Further, workers may be erratic, disloyal, late comers, wrong users of tools, rash in using machineries and lazy, not capable of completing the assigned task and target, quarrelsome with fellow workers, waster in using raw material, absent minded, immoral, habitual of exhausting leave without need, then resorting to false sickness, loitering in the industrial premises, resorting to playing cards and gambling during duty hours etc These are certain examples of the follies of the workers at the industrial site. The reaction of the employer to these erratic behaviour of the workers may be either very harsh or mild, giving a chance to improve.

Likewise, the employer may also indulge in erratic behaviour towards his employees He may assign hard task with rigorous conditions knowingly to harass the employee The worksite may be unsafe, dirty, without ventilation, dark, dinghy and full of foulsmell - Though these conditions may be improved but the employer is saving money He may be guilty of providing bad and inadequate tools and machines full of danger while in operation. He may provide bad quality of raw materials hoping to get out of that a very good quality of finished product. He may be exacting hardwork for a long duration than feasible and without proper rest and amenities. While paying the employees, he may resort to less payment, irregular payment, payment in kind but at more than market rate. He may fix low wages and higher allowances so that

post retiral benefits and payments may be lesser, because every calculation is done on the basis of quantum of basic wages last drawn by the employee. He may be reluctant in paying overtime, bonus, maternity leave, sick leave etc. There may be hundreds of instances where employers do not behave bonafide and in the true spirit that the worker is a necessary means of production and is a human being and should be treated as such. Even machines need a proper care and maintenance for their proper use and service, so why not a human being is given a proper care and maintenance for his proper performance in the production processes.

The Law prohibits unfair labour practices by both the parties of the contract of employment and also envisages daytoday working rules and maintenance of discipline at the worksite, as per Industrial Dispute Act, 1947, and Industrial Employment (standing order's) Act, 1946. Yet the gap in implementation needs improvements.

The Problem of peace keeping at industrial establishments needs control of workers behaviour in connection with production processes and if they go erratic, the reaction of the employers towards worker's behaviour also needs a look. In order to check these tendencies in workers as well as employers we need adequate provisions in law. The subject - matters are as follows -

- i) The response of the worker in maintaining the employer employee relationship by performing the assigned task efficiently and within the prescribed time, if any ;
- ii) The erratic behaviour of the worker at the work site ;

- iii) The response of the workers over the erratic behaviour of the employer ;
- iv) The response of the employer in maintaining the employer employee relationship, (by providing Tools, machinery raw material and a congenial and safe atmosphere at the worksite).
- v) The reaction of the employer over the erratic behaviour of the workers ;
- vi) The erratic behaviour of the employer ;
- vii) The basis of the categorisation of the workers for payment and workload ;
- viii) The response of the employer over the general well-being of the workers, customers, Government and the nation.

The Contract of employment may contain all these points If we give proper stress on the importance[†] and efficacy of this document at all stages of its execution and implementation many a confrontations may be avoided, and if arisen, solved. As pointed out earlier, to facilitate the workers and the employers the law has provided a format of contract in the Industrial Employment (Standing Orders) Act, 1946 where the worker and the employer do not have their own Terms and Conditions, they may adopt the specimen terms and conditions of employment contract as provided in this Act. But this provides simply guidelines. The freedom of contract, has not been curtailed by it.

c) Concept of Freedom of Contract :

This term is a bye product of the concept of 'Lessez Faire' by which state intervention is the least in the individual affairs of the people. Thus, in theory, both the parties of a

contract of employment stand on equal footing and their conclusion is effective. But in practice, the worker happens to be a weaker party and accepts the terms and conditions of the employer as dictation. In the beginning of industrialisation workers were exploited at the hands of the capitalist employer. Later on, the concept of 'welfare State' necessitated the intervention of the state for securing the welfare of these teeming millions of the workers doing hard work under subsistence wages. To ameliorate the lot of these workers, the State intervened through legislation to ensure a minimum wages, a cash wages, a timely paid wages to these workers. The law ensures the minimum wages. Above the minimum wages parties are still free to negotiate and feel satisfied through the contractual obligations. This minimum is satisfactory or not depends upon many circumstances which are not static and so an ideal minimum becomes a bare minimum by the change of circumstances and leads to dissensions in the form of various demands by the workers specially for revision of their wages and allowances.

d) Freedom of Contract in India :

The advent of industrial revolution in India has been nearly, a hundred years after its impact in western countries, i.e. by about 1850, yet all the rigours of workers exploitation were present here also. The only difference was that in case of western countries there was least state intervention, but in India, whatever legislations were passed during the early period of

industrialisation, they were pro - employer ⁴ The rest is the repetition of history.

The present position is that though there is freedom to enter into the contract of employment but the major terms and conditions of employment are determined and controlled by the law. The initial freedom of entering into a contract of employment is also sometimes controlled by the factor of Age, Domicile, ~~A~~ particular standard of physical fitness including power of bare eye sights etc. Belonging to a particular caste and sex also sometimes determines the freedom of contract at the entry point.

Here in India the Law controls payment of Bonus, the age of retirement, the duration of continuous working in hazardous type of assignments causing danger to limb or life of the worker slowly but definitely or assignment to a job which requires constant attention, night duty, shift duty, double duty, duties by women and children etc. The legal provisions try to control the above and to make sure these provisions cannot be contracted out. The minimum quantum of wages, the dispersal of wages in cash and within a particular interval in monthly calculations has been fixed by law. So the freedom of contract exists after fulfilling the bare minimum. In view of this, in order to provide a viable solution of the problem the author of the thesis tries to suggest some measures to tackle the problem through the contract of employment applicable to industrial establishments in India. I

4. Workmen's Breach of Contract Act, 1859. Plantations Act, 1863; The Transport of Native Labourers Act 1863 of Bengal; Section 490, 491 and 492 of IPC 1860 - providing punishment for breach of contract by labour; The employers and workmen (Dispute) Act, 1860, etc.

have, therefore, tried to investigate, locate and pinpoint the efficacy of the contract of employment as a means to curb the present day industrial unrest and decadence of efficiency. No doubt, workers at times are found at fault, but, the employer is also not always praiseworthy. This hide and seek game for holding the other party at fault must stop. This can precisely be achieved, if the contract of employment entails clearly the obligations of each party in a given situation. No party of the contract of employment should be allowed to scuttle the goal of development, more production, prosperity and equitable division and distribution of the national wealth among the participants of production and the people.

2. Necessity and Importance of the Contract of Employment : -

It is necessary to keep the wheels of production going. For this, it is necessary to keep the most sensitive partner of the production i.e. the worker, satisfied, so that a willing worker participates effectively. This ensures a positive industrial peace which is the mother of progress, prosperity and a general well being. So the contract of employment must be buttressed to achieve the desired results.

Now, there may be certain questions on the efficacy of the contract of employment as a panacea for all labour troubles. Firstly, when there is no 'freedom of contract' how the contract of employment will be of use in solving the labour problems? Secondly, if everything desired is to be achieved through the forum of law, what is the need of the contract of employment?

It is true that law intervenes, nowadays, at every stage of

contract of employment and as such through the contract of employment there is no absolute freedom of the parties to the contract - but to have the fruits of legal provisions - the contract of employment is like the media or a mirror through which the fruits of legal provisions get a concretization or reflection for an ideal implementation. Moreover, the law provides for the basic or bare minimum, over that minimum it is the contract of employment through which things desired may be achieved. Further, the present era is the era of competition and publicity and so sometimes to curb competition and get publicity, the employers put very lucrative terms of employment not intended to implement. This myth may be exploded by organised workers union by getting these terms implemented. This is possible only when the contract of employment is in vogue and in active operation. As such, the contract of employment may be treated as a means to achieve the ends of law.

The importance of this study lies in the fact that if the contract of employment is properly entered into and its terms ~~and~~ adequately implemented, there will be a positive peace at the industrial establishments leading to progress, prosperity and a general well being of the country. Further, the human aspect of the society, the worker and his family will feel satisfied and it will usher in a golden era where in development of Art, Culture, music, construction of great buildings establishment of new industrial avenues will set in. A period of Renaissance will ensue where there will be a culture of plenty - no place for hunger, poverty, squalor and dirt. Let us hope that it materialises. It is neither platonic nor impossible. It requires simply a strong will.

to implement the terms of the contract. The terms, must be formulated to accord a proper place of honour and equality to the workers as they are the real partners in the process of production. The reformers who preach for 'socialism', 'social distribution', 'social justice' or 'distributive justice' or 'socialistic pattern of society' have accepted not only the participation of workers in productive processes but also in managerial tasks as well. The concept of workers involvement in industrial management is only one of the means to ameliorate their lot and rejuvenate their thinking of oneness with the industry, while the contract of employments' potential is very wide as it would cover the entire behaviour of the worker at the industry. It will generate an initiation of work culture, a scientific outlook, a quest for knowledge and a change for good, put together will transform the whole scenario at the Indian Industrial front to a better future. The dedication, loyalty and efficiency will be properly rewarded and will enhance the overall production. An efficient worker will not get less than a deficient worker. There will be no place for nepotism, flattery and 'Netagiri' in the management of industrial establishments. The management will be an alert management always keeping an eye over the pulses of workers' movement, ready to rectify, mould, compromise and reform. The work site will not be the battle-field for workers and management but a congenial ground for meeting of minds, machines, and endeavours. It will open new vistas not only for production but for human relations as well. The overall outlook will change and some benevolent side effects, it is hoped will also accrue. The socialization of profits will become

possible. The ego of owning and involvement, by the workers will generate an atmosphere of satisfaction and they will proceed towards construction instead of destruction.

3. Sources of Law of Employment with particular reference to Industrial Establishments in India :

The main sources of Law on the subject of the present study are two, one the legislation and the other judicial decisions. These sources are linked with the pace of industrial development and the administrative development of legal institutions, including the transformation of the country from a British India to an independent sovereign socialist democratic India, whereby the system of courts and tribunals have got a sea-change. In the point of time, priority and efficacy, the legislation stands first, though the recent trend of judicial decisions has been to support and sharpen the scope, applicability and approach of the legislation on the subject. For example the meaning of Retrenchment,⁵ Reinstatement⁶,

5. Right from Pipraich Sugar Mills Ltd. v Pipraich Sugar Mills Mazdoor Union AIR 1957 SC 95 to Gujarat Steel Tubes Ltd. v Gujarat Steel tubes Mazdoor Sabha AIR 1980 SC 1896, To Punjab Development and Reclamation Corporation Ltd. v Presiding Officer, Labour Court (1990) 3 SC 682. The Term retrenchment has been interpreted in different shades

6 Under the Common Law rule of Master and Servant, since personal service could not be decreed, upto 1947, there was no reinstatement of an exonerated worker in India, the remedy was compensation. The re-instatement began to be ordered by the inception of Tribunals under the Industrial Disputes Act, 1947. See Western India Automobile Association v Industrial Tribunal (1949) 1 LLJ 245.

Industry⁷ and worker⁸ etc. has been widened, innovated and reinforced by the judicial decisions.

a) Impact of Industrial Revolution in India :

The impact of industrial revolution was realised in other western countries in between 1760 and 1830⁹, while in India, the first cotton factory as such was established in the year 1851, though it began production from 1854; and in that very year the first Jute factory was established in Srirampore (West Bengal)¹⁰. Further, before the factory system came into existence in India, the Plantation Industry was the main source of enterprise in India usually under the domination of Englishmen. Through the East India Company Englishmen came here as traders in 1604 and by passage of Time, they created such a position that our Superb Craftsmanship in cotton, silk, metal work and shawl making etc. was annihilated. The Englishmen used

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7. Bangalore water supply and sewerage Board V A.Rajappa AIR 1978 S.C. 548. This case necessitated amendment in the definition of Industry as found in Industrial Disputes Act 1947. This case restored its ruling in Budge Budge Municipality V P.R.Mukherjee (1953) 1 Lab LJ 195 (SC) Corporation of city of Nagpur V Its Employees (1960) 1 Lab LJ 251 (SC) State of Bombay V Hospital Mazdoor Sabha AIR 1960 (SC) 610, while over-ruling the ratio of National Union of Commercial employees V Meher (1962) 1 Lab LJ 241 (SC), Madras Gymkhana Club Employees Union V Gymkhana Club (1967) 11 Lab LJ 720 (SC) Management of Safdarganj Hospital V Kuldeep Singh Sethi AIR 1970 SC 1407; Dhanraj giri Hospital V Workmen AIR 1975 SC 2032.
 8. To mitigate the hardship caused by Dharangadhara Chemical Works V State of Saurashtra (1957) 1 Lab LJ 477 (SC), The SC in Hussain Bhai V Alath Factory (1978) 11 Lab LJ 397 (SC) included 'dependent intreprenuer' in the purview of a workman.
 9. T.R. Sharma and S.D.S.Chauhan - Indian Industries, 1982, p.9.
 10. K.N.Subramanian - Labour Management Relations in India 1967, p.7

to take at cheaper rates raw materials of cotton, iron ore, metal etc from India and brought back finished goods of these very raw materials in India to sell at higher prices. It was a very profitable engagement boosting the industrial efforts of manufacturing goods at England. The textile industry in England was the biggest industry in terms of profits and employment at that time. To cater for dyeing and bleaching of Textiles, indigo was an important ingredient for this industry at England and Englishmen in India encouraged the farming of Indigo by their own exploitative means and methods.¹¹ Indian labour was indentured to other colonies and countries also by these Englishmen on allurements but actually the service conditions of these labourers had been a sad story-a wretched one, even more disdainful than the slaves of the Roman Empire.

b) Means of Legislation to Control Labour :

The Indigo plantations were started by the British, French and Indian planters. Planters entered into contracts with peasants to grow for them indigo crops, and advanced money for their expenses. These contracts were usually limited to a period of five or ten years, but in fact once a planter for a sahib was always a planter for the sahib, generation after generation. The indigo plantation lasted till the invention of synthetics-dyeing which was cheaper, attractive and easy to use.

11. Money was advanced for carrying on the farming and once a farmer took the money, he with his farm became the slave-like of the creditor. For money advancing coercive as well as deceptive methods were used. "As an indebted person he must continue to work for the same creditor," custom imposed this obligation. (See Daniel Houston Buchanan, The Development of Capitalistic Enterprise in India (1966) p. 45.)

The Plantation industry which began with indigo, after the advent of synthetic dyeing did not collapse, rather its course was changed to Tea, Coffee and Rubber by 1835. By the middle of nineteenth century plantation was proving to be a very profitable enterprise. To protect their own interest the English masters took the help of legislation which was very easy and effective course at that time for them. As such, as pointed out earlier, the legislation¹² of this early period is pro-employer and exploitative to the worker's interests. By 1860, the Englishmen had enough legislation for their purposes.¹³

The Factory Act 1881, the Mines Act 1901, the cotton Ginning and Pressing Factory Act 1925, are the some of the earlier Acts which have been given a new shape after 1947.

After the first world war and establishment of International Labour Organization in 1919, (India being the founding member) the Labour legislation took a new trend because of the pressure of the world body and the political pressure in England over the bad rule of English administrators in different colonies, to make a show piece of Indian scene, some trend setting legislations were passed¹⁴ after 1919

12. See Note 4.

13. The Employer's and Workmen (Disputes) Act 1860 was passed for Summary settlement by Magistrates of disputes over the wages of workers. There is no reported case under this Act, as it was sparingly used - it had become a dead letter long before 1931 - Report of the Royal Commission on Labour in India (1931) 337.

14. The workmen's compensation Act, 1923; The Indian Trade Union Act, 1926; The Trade Disputes Act, 1929 - (this was repealed by Industrial Disputes Act, 1947) The Payment of Wages Act, 1936; The Employers Liability Act, 1938, The Industrial Employment (Standing Orders Act) 1946; The Minimum Wages Act 1948 etc.

During the post independence era, many a legislations in the direction of welfare, education and a guaranteed post - retiral peaceful life of the workers, were passed. The Plantation Labour Act, 1951, Mines Act, 1952, The Coal Mines (Conservation and Safety) Act, 1952; and the Employees Provident Fund Act 1952 etc are examples. The Employees Provident Fund now stands as The Employees Provident Fund and Family Pension Fund (Amendment) Act, 1973. For workers education, in 1958 a Tripartite 'Central Board for workers Education' was established to educate the workers in trade union philosophy, their rights and duties, collective bargaining and importance of work culture etc for instilling in them trade unionism on democratic lines to achieve constructive ends. The Maternity Benefit Act, 1961, The Payment of Bonus Act, 1965 The Contract Labour (Regulation and Abolition) Act, 1970, The Payment of gratuity Act, 1972, The Bonded Labour System (Abolition) Act, 1976, The Inter State Migrant Workmen (Regulation of employment and conditions of service) Act, 1979, were passed to ameliorate the conditions of workers after 1960, when by 5 year plans it was realised that workers condition needs a proper handling.

The labour being in the concurrent list of legislation in the constitution, the legislations² passed by the Union Government as well as State Governments being applicable to their respective State Territories are available, but the central piece sets the Trends while local pieces adjust them according to their local needs.

If we analyse the overall legislation on Labour from 1860 to the present day, we may deduce the approach of the government in

three forms, viz., opposition toleration and welfare

Mr. S.K.Haldar was also of the same view —

" The Attitude of Government towards labour conditions and aspirations and consequently the nature of labour relations laws which are the direct result of that attitude, has three well marked phases in every democratic country. These phases are - opposition, toleration and encouragement, rotating in a cycle order "15

When Governmental attitude is in opposition to labour's demands and aspirations, we expect such repressive laws as ruthless prohibition of Associations, combinations and strikes by workers and sometimes unwillingness by the government to remedy even the genuine grievances of workmen When Government attitude is one of toleration, we expect ~~some~~^{but} some legislations which are just a change for the better, such as some Factory, Mines and other Acts, to remedy the suffering of the workers We also expect in this phase that association of workmen and their right to strike, though not actually encouraged, are, nevertheless not suppressed by law. Finally, the third phase of encouragement induces a frank and full recognition of worker's right to form associations of their own choice and their right to strike, a recognition of workers right to collective bargaining on all matters concerning their welfare, their right to settle their disputes either by voluntary conciliation or Arbitration and not by Government machinery set up for the purpose.¹⁶

c) Judicial Decisions and Source of Their Interpretations :

The Judicial decisions on the subject form the second most important source The following are some important sources of

15. Haldar S.K. - Evolution of Labour Management Relations, Calcutta, 1953 - p.2-3.

16 Ibid p.3.

Judicial interpretation ;

- 1) General principles of law which may be termed as Indian Common Law.¹⁷ These principles were originally applicable in England but have been modified and adjusted to suit the Indian conditions. These principles are constitutionally protected under Article 366 (10). Many of them e.g. the principle of 'Common Employment' has been abolished through statutes.¹⁸
- ii) Precedents - This head will cover the decisions of Supreme Court and High Court and specially the awards of industrial tribunals and labour courts as well, whose power in labour matters is much more wider than ordinary civil courts because these tribunals may entertain settlements of disputes beyond the bounds of ordinary civil courts. These tribunals aim at peace keeping, protecting trade union activities by preventing unfair practices and victimization of employees.¹⁹

Industrial Tribunals can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It can create new rights and obligations between

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17. The Common Law in India - Setalvad (1970). The Indian Legal system Ed by J Minattur, ILI, 1976. See Director of Rationing V Corporation of Calcutta (1961) ISCR 158 also Western India Automobile Association V Industrial Tribunal (1949) LLJ 245 (FC)
 18. Employers Liability Act, 1938.
 19. Rohtas Industries Ltd. V Braj Nandan Pandey ((1956) 11 LLJ 444 ((SC).

the parties which it considers essential for keeping industrial peace.²⁰

Industrial Disputes Act, 1947, sections 18 and 17(2) prescribe that awards of Industrial Tribunals/Courts are binding on all the parties and shall not be called in question by any court. Any settlement, contracting out, or inconsistent standing orders shall not mar the efficacy of Tribunals award, as they over ride all other sources of contract of employment except the mandatory provisions, if any, of any relevant statute.

- iii) Collective Bargaining settlements under sections 2(b) and 18 of the Industrial Disputes Act 1947, must be considered to find a solution of a labour dispute, as these settlements have over riding effect even on the express and implied provisions of an employment contract and standing order of the concern as well.
- iv) work rules, standing orders and instructions of the employers should also be taken into account to arrive at the correct legal position of the employee vis a vis the employer to do justice. The standing orders derive their legal force from the Industrial Employment (Standing orders) Act 1946.²¹ Terms of standing orders would prevail over the terms express or implied of the contract of employment but not over the

20. Bharat Bank Ltd. V Employees of Bharat Bank Ltd (1950) LLJ 921 (SC) at 948.

21 See Tata Chemical Ltd V Kailash AIR 1964 Guj 264.

provisions of any statute.²² For daytoday needs, work rules and instructions of the employer carries weight, because to keep employer - employee relationship, the employee will have to bow down to the discipline and orders of the employer. Any malafide will vitiate the relationship.

- v) Express terms of the employment contract, is useful as a source, when the special contracts for special needs are entered into, when highly specialized, skilled and technical jobs are to be catered. If there is any conflict between the given standing orders and a special contract of the employer and the employee, the latter will prevail, since standing orders are not a statute but are framed under a statute.²³

Express terms override custom and usages of trade and implied terms of the contract also.

- vi) Implied terms of Employment Contract - Just as 'Justice equity and good conscience', the court may see an implied term to give 'social and economic' justice as an ultimate ideal of industrial adjudication.²⁴ Terms are implied, imposed, modified added and innovated even against the express terms of employment contract by industrial courts to import social justice and acquire industrial peace, and growth and progress of industries.²⁵

22. Workmen of Dewan Tea Estate V Their Management (1964) 1 LLJ 358, Workmen of Buckingham and Carnatic Mills Ltd. V Buckingham and Carnatic Milk Ltd. (1970) 1 LLJ 26 (SC)

23 J.K. Cotton Manufacturers Ltd. vs. J N. Tewari AIR 1959 All 639.

24. See Crown Aluminium works V Their Workmen (1958) 1 LLJ 1, (SC)

25. Bharat Bank Ltd. V Its Employees (1950) 1 LLJ 921; Rastriya Mill Mazdoor Sangh V Appollo Mills (1959) 11 LLJ 263 (SC).

vii) Custom and usages followed in the industry can become enforceable only if it is proved that they have been followed continuously for a sufficient long time ²⁶ Custom and usage to form a part of the contract of employment must be reasonable.²⁷ Custom and usages cannot override any statutory provisions or standing orders²⁸ or Express terms of special contracts

4. The Scope of the Study :

The Industrial Employment, confining the relationship of ~~the~~ workers with the employers with in the industrial establishments for production and allied processes shall be the main thrust of this study.

In the process of distinguishing the basic attributes of industrial employment, a distinction with Government service domestic service and contractor's workers employment will also be drawn. Like every employment contract, the industrial employment contract has also three stages viz -

- a) The initial stage of recruitment to pin point who, where and how much man-power will suffice ;
- b) The continuity of the contract of employment whereby subsistence of employment contract will be decided, and
- c) The retirement of the worker to adjudicate the post retiral rights and duties of both the parties of the contract of employment

26. Kanpur Sugar Works Ltd. v Their workmen (1955) 11 LLJ 419 (LAT)

27. Ramesh Vinayak Korde and others v Ahmedabad Electricity Co.Ltd. (1958) 1 LLJ 686

28. Common Wealth Trust v Labour Court (1963) 1 LLJ 516.

The purpose of keeping the industrial peace will be jeopardised if proper precautions and norms of recruitments are not followed while engaging a worker at the Industrial Establishment for the first time. Likewise to keep the relationship continuing there must be some reasonable terms and conditions and a willing working hands as well as cordial and congenial overall atmosphere at the worksite provided by the management. There are certain tricks of the trade, trade secrets, list of customers, production expertise etc which the workers come to know during their employment. It is their duty to maintain these secrets even after retirement. But for this, if the limit of time and space is not properly fixed, this might become a farce, hence in every contract of employment, allowing full weightage to the nature of production, the duty of the workers to keep these secrets and informations confidential, will be imposed. Likewise, there will be the duty of the management to pay pension, provident fund, gratuity etc to the worker after their retirement, faithfully.

The Law of Employment has many a facets, dimensions and off-shoots and on each and every such dimension a separate study may be undertaken and expert results obtained. There may be a study on 'Recruitment' a study on 'Retrenchment' a study on 'compensation' or 'Strikes and Lockouts' etc or workers participation in Management. We shall deal with these aspects where there shall be a need.

Primarily, the present study will cover the contract of employment in industries in India covered by The Industrial Disputes Act, 1947, and Industrial Employment (Standing orders)

Act, 1946; together with Factory Act, 1948; The Minimum Wages Act 1948; The Payment of Wages Act, 1936 and The Workmen's Compensation Act, 1923.

The following categories of workers shall stand excluded —

- a) The government servants who get enough protection under Article 311 of the constitution ;
- b) The personnel employed in industries but not in the capacity of workman e.g. supervisory or managerial staff more concerned with administrative jobs drawing more salary than is covered for a worker, as prescribed through statutes ;
- c) Certain workers working in government owned factories just as Defence Depots, Railways Coach Factory etc. have the choice of recourse for their disputes settlements either to Article 311 and Administrative Tribunals Act, 1985 or to Industrial Disputes Act, 1947. As such, when they resort to Administrative tribunals for their grievance redressal, they shall stand excluded ;
- d) The employee of statutory Bodies created by the Acts of Parliament or State Legislatures, if treated as semi - state employees with their special rules and regulations They shall be covered if they adopt the Industrial Dispute Act, 1947 for their dispute redressal ,
- e) The 'Self Employment' cases shall also stand excluded;
- f) The workers of the contractors shall also stand excluded as Contract Labour (Regulation and Abolition) Act, 1970 has already been passed and at some places workers of this category have formed their cooperative societies for excluding the contractors.

Our endeavour would be to find such a dynamic format of contract of industrial employment which shall contain a built-in-machinery of grievance redressal to be self-charged when the situation so demands as to make it speedy, accurate humane and result orientated. Let us hope, the provisions so suggested shall be implemented honestly to tackle the workers-problems and in result, there will be industrial peace, leading to progress, prosperity and well being of the workers as well as the general masses, in India.

CHAPTER - II

CONCEPTUAL FRAME WORK OF CONTRACT OF
EMPLOYMENT IN INDIA

A. The Concept of Industrial Employment in India :

The concept of Employment in Law becomes very simple to comprehend, if we begin with the law of obligations. Under the law of obligations, the law of contract and torts have found their roots and under the law of contracts, the law of Employment and Industrial employment are like a species. Where the workers sell their labour, skill, services etc. in consideration of remuneration whether it is called salary or wages, a kind of relationship develops between the one who puts in labour and the other who agrees to pay for it. The wages may be in kind or cash or partly cash and partly in kind. Mere presence of the worker at the worksite is not enough. He must do something, he must participate in the process of production executed either manually or through machines.

The concept of employment implies that both the parties undertake to continue the arrangement. This we call an intention to create legal and contractual relationship in legal language for creating a valid contract, and, may be called here as willingness of workers to report for duty and, desire of the employer to retain the worker to continue the arrangement. That is also called the element of cooperation needed and expected from both the parties of the contract. Sometimes, it is also treated as implied terms of the contract of employment.

The Contract of Employment may cover a long period for its continuity. It differs from simple contractual transactions in one glaring respect and that is its repetition. The relationship of employment begins at the start and repeats itself daily when the

worker presents himself for duty and the employer provides him with tools, raw materials and instructions as to what he is to do. This special feature of the contract of employment generates the problem of 'Security of job'. This certainty of the continuity of the relationship denotes that the job is secure, and this 'security of job, whether leads to efficiency or curtails it, becomes a moot point. So a good manager never overlooks this aspect of the arrangement, so that peace and efficiency at his establishment may prevail.

Contract of industrial employment may be said to develop in three stages. The first stage is the beginning of the contract where in the worker agrees to sell his labour or skill for wages and the employer agrees to pay compensation for the same. The second stage of development may be termed as the subsistence of the contract of employment. It consists of continuation of the arrangement where in basically both the parties behave in accordance with the terms of the contract. The contract may continue till the workman reaches the age of superannuation or the industrial establishment lasts.

In the beginning of industrial revolution, when the 'Laissez Faire' doctrine was in vogue, the master could 'hire and fire' the worker at any time. But now with the development of the doctrine of a welfare state, many a legislative measures have been enacted to safeguard and protect the interest of the workers. Certain procedures prescribed by law has to be adhered to, to put an end to the contract of employment and in case of industrial employment such a procedure is prescribed by industrial legislation. For any

termination to be legal, this procedure has not only to be followed but it has to be a reasonable fair and just also AS such, now it is possible to terminate the wage earner only when all the modalities of notice is complied with or notice pay in lieu of notice together with retrenchment compensation is paid to the worker as provided in the Industrial Disputes Act, 1947 ¹

Since it is easy to exploit a new recruit economically, socially and administratively in the industrial setup, the employer always prefers new hands, (where there is no need of any skill, training or expertise) at the place of old ones hence if the employers are allowed to carry their day, the human aspect of the old workers in the industry would suffer a lot. The law has applied a brake on the machinations of the employers by providing for compensation and issue of notice or notice pay in lieu of notice if a worker is to be terminated for any cause whatsoever. The policy of the law is to have a continuity in the employment and production in the industry. So every right thinking person will support for subsistence of continuation of the contract of industrial employment. It generates industrial peace so vital for the progress, prosperity and overall development of the industries and thereby the country as a whole.

The third stage of the industrial employment contract is the stage where in the contract comes to an end. By the end of the contract, many a duties begin to come into existence on the shoulders of both the parties. Post retiral benefits are to be paid by the employer and many a secrets of the trade, in which the worker was involved as a matter of duty are to be concealed

¹ See sections 25 F(a), and 25 F(b) of Industrial Disputes Act, 1947

and kept like a secret by the worker. Though there is a reasonable limit of time and space for competing with the employer, yet within that limit the duty of keeping the secret and refraining from competition by the worker stands intact.

This idea of three phases/stages of industrial employment contract has been described by western legal experts as two tier system of employment contract.²

B Historical Evolution of the Concept of Law of Employment in India :

(1) ANCIENT PERIOD

The industrial establishments of present concept wherein prototype mass production of goods, services, exchange of technical expertise etc is carried out, owe their commencement in India, roughly from 1850 A.D., the year in which Jute, Cotton iron industries etc got their roots in factory style. Before that, the Artisan was the master and centre of the industrial activity where in family and guild type of atmosphere prevailed at the worksite as number of workers/Apprentices/Disciples was limited and centred round the different master craftsmen scattered over the different regions of expertise. Industries were basically handicrafts where use of machines was out of question, though tools were used. As such, the present form of industrial development and industrial employment therein, is not more than one and a half century old in Indian Context.

2 M.R.Freedland in 1976 propounded the theory of two tier system of contract of employment. Also see 'The structure of the employment contract' by Patrick Elias (1982) 25 CLP 95

To locate the law of employment in Ancient India, when Hindu social systems were predominantly in vogue, it is necessary to keep certain points in mind. Firstly, contractual obligations were treated more as a religious duty than mere an obligation due to a contract because of the pervasive religious bondage by which the society was knitted and run Secondly, different Smritikars ordained through their verses - the law, representing different ages and regions The commentators, afterwards, while interpreting those very verses gave proper place and importance to the customs governing the regions and growing needs of their times Kautilya Arthshastra, Manu Smriti, Yagna valkya, Vishnu Smriti, Narada Smriti, Shukra Niti etc. either can be consulted in original or through their commentators to find out the required law on the subject.³ In Ancient India the rules were provided for formation of contract of employment, wage fixation, Dispute settlements for negligence and go slow tactics, on fundamental breach⁴ on sabotage and strike and responsibility of guild/union members (SANGH - BHRATAH)⁵ On Breach of Contract verses are there in Arthshastra⁶ Yagnavalkya's⁷ Smriti, Manusmriti⁸ Vishnu

3 See Sacred Books of the East; Kautilya Arthshastra by Dr.Shama Shastri, Manu and Yagnavalkya - a comparison and contrast by K.P.Jaiswal Tagore Law Lecture, Cal, 1917, Background to Indian Law by G.C.Rankin Evolution of Ancient Indian Law by Dr N.C.Sen Gupta Tagore Law Lecture, Cal,1950 Evolution of Labour Management Relations by SK Haldar, cal, 1953; Industrial Jurisprudence by S.N.Johri, Delhi - 1984.

4 Kautilya Arthshastra by Dr.Shama Shastri Book 3 p 226-27.

5 Evolution of Labour Management Relations by S.K.Haldar, Cal, 1963, p.126.

6 Arthsastra Ch.II p. 184.

7. Yagyavalkya II 193-195.

8 Manu VIII 215-216

Smriti⁹ and Narada Smriti.¹⁰

Dr S.N.Joshri, while discussing the 'Historical settings of labour in Ancient India' has elaborately quoted from Kautilya Arthshastra, Yagnavalkya Smriti Prakasham Kane's Dharmashastra, Narad Smriti, Sukra Niti, Manu Smriti, Vishnu Smriti, Brahaspati Smriti to pin point the rules in Ancient India regarding payment of wages, minimum wages, settlements of disputes by arbitration imposition of fines for breach of contract, labour unions, leave rules, payment of bonus, rules for apprentices and vocational training etc. touching more or less every aspect of labour - relations which we boast of modern origin ¹¹

In Ancient India, the different exponent of law have given their rules on the same topic which are sometimes different and create confusion as to which is correct and which one is to be followed. The confusion is removed when we understand that all the different Rishies e.g. Manu Yagnavalkya, Narad Brahaspati and Kautilya represent different periods of time, region, place and school. One should be guided by his own school and harmonious following of the law.

We can draw certain uniform basic principles accepted by the majority of thinkers and law givers of that time, e.g. the contract of employment was applicable to workers of that time in agriculture, cattle rearing, transport of goods and certain handicrafts industries. The same worker supplied, sold, repaired

9 Vishnu Smriti Ch. V p. 153-59.

10 Narad Smriti Ch VIII p 2-3

11 Industrial-Jurisprudence - S.N.Johri Delhi - 1984, p 22-31

and, if the need be, worked with the master craftsman to an employer. An independent Artisan at his place, had no hesitation to work at the place of the employer. The concepts of Act of God, Impossibility, Act of state were known and practised. The right thinking with an element of just behaviour clothed with the sanction of sin, did the smooth functioning of the contractual obligations, where no terms of contract were fixed at the commencement, it was either treated as partnership or the wage element was decided by an expert. The breach of contract, was slow impediment to start within auspicious time by a carrier workers to take care of tools and equipments if supplied by the employer, all had been provided for, in Ancient Indian legal frame. Since Factory system and present mode of production was not prevalent at that time, we can draw only inferences for present use.

(ii) MEDIAEVAL PERIOD

This period may be divided in two phases -

- a) Mediaeval period of first phase covering the period from 600 AD to 1200 AD - predominantly Hindu ruled India, and,
 - b) Mediaeval period of second phase from 1200 AD to 1850. It was predominantly a Muslim ruled period; though from 1765 English people had Diwani rights for Bengal, Bihar and Orissa and ultimately the dawn of industrial revolution came by 1850 in India.
- a) The First Phase of Mediaeval Period, had a village based, self sufficient, economy. Some Art and Crafts also developed catering for village needs as well as for exports and needs of the other parts of the country. The workmanship was no

doubt of par-excellence standard having a ready market. Steam power or electricity was unknown and 'Factories' had not come into existence. Occupations being hereditary, facilities for apprenticeship and training automatically existed and technical skill being inherited from father to son tended to perfect itself. The various kinds of guilds ~~was~~[^] also inexistence. It has been defined

" as corporation of people belonging to the same or different caste but following the same trade or industry" ¹²

These organisations were important in as much as their rules were recognised as valid in the eye of law and their representatives had a right to be consulted by the king in any affairs that concerned them. ¹³

The industrial setup was Artisan based and not factory based during this period. The contract of employment for our purposes confined to apprenticeship contract.

- b) The Second Phase of Mediaeval Period - witnessed predominantly a Muslim rule and Culture. During this period, wherever Hindus were rulers slavery and serfdom were practically non-existent, that forced-labour was never tolerated and that cultivators, artisans, shopkeepers and vendors of merchandise enjoyed protection of the state. ¹⁴

With the onrush of foreign invaders, arson and loot became the common feature of those days. Artisans also ran away to

12. Halder, S.K. : Evolution of Labour Management Relations, Cal, 1953 p 126

13 Ibid - p.128

14. Ibid - p 133

distant places for comparative safety when the invader established himself and restored order, trade and industry would also gradually revive. By repetitions of these upheavals, the industrial efforts suffered. The frequent changes of rulers also affected the industries. Unlike the Hindu regime, during Muslim rule, the life of the labourer was degraded slavery which was never tolerated by the Hindus, appears to have existed widely during the Moghal rules. Dr. D.Pant observes :

" Remuneration was on the good old principle of giving as much to the labourer as would enable him to do the work and to keep him alive "15

During the Moghul rule, the state was the biggest entrepreneur and all highly skilled artisans and craftsmen would be moved to government workshop. There was a small class of men also engaged in trade and business as well as manufacture of articles. The manufacturers were essentially domestic and hereditary. The manufacturer was home staying but as soon as his reputation of high skill reached the authorities, he would be ordained to move to the Government workshop.¹⁶

During this period, though the rulers solicited manufacturers of their excellent products, yet basically the industries were cottage industries run by the efforts of the artisans themselves. The only solace was the ready market provided by the ruling class.

15. ' Commercial Policy of the Moghals ' - p. 64.

16. Halder, S.K. Evolution of Labour Management Relations Cal 1953, p. 133.

We may arrive at the following findings regarding Mediaeval period of 1200 to 1850 -

- 1) That society had no systematic law and order and resultant peace and security - a fact which generates industrial growth. The rulers were engrossed in their luxuries and for this they heavily taxed, grabbed, confiscated the properties of the subjects.
- 2) No fair wages was paid to the labourers. To exact work from the working class of these days was treated as a matter of right.
- 3) The state employees were also not paid adequately and their services continued on the whims of the rulers. No Natural Justice of modern concept was in vogue.
- 4) Artisans always preferred to remain at their home, because the contractual position where both the parties are given equal footing, was never adhered to. The employer remained in commanding and dictating position.
- 5) The labourers who were not artisans, were unorganised poor, starving and available in abundance having no bargaining power.
- 6) Industrial scope confined to household craftsmanship. Though of par-excellence quality - yet their overall return reached the subsistence level to the worker. Mass production and prototype production in factory style was unknown.
- 7) The Artisans were usually self employed but sometime they worked for a particular employer as well. Submission to the

dictates of the master in the name of loyalty and custom was the rule of those days. Wages were meagre to the tune of subsistence level. Begar, Bondage and oppression was not despised and this was more rampant on the agricultural front

(iii) INDUSTRIALISATION AND CONCEPT OF EMPLOYMENT
(The period from 1850 to 1947) :

The concept of industrial employment started gaining ground in our country, like any other country of the world, with the advent of factory system of industrialisation. The break through was made by Plantation in indigo, tea and coffee etc. In the beginning the emphasis was placed on freedom of contract as the doctrine of Laissez Faire held the ground on those days. As for the Indian Labour was concerned the freedom of contract had a little or no significance for various reasons. The labourers were available in abundance and were poor and illiterate. Therefore their bargaining power as compared to employer was very weak.

During this period, the Britishers were at the helm of the affairs in India. From 1765 when they bought Diwani Rights for Bengal, Bihar and Orrisa, their expansion programme to rule India enhanced day by day culminating into the upheaval of 1857 by which the British crown itself took the reins directly divesting the powers of East India Company.

The impact of Industrial revolution in Europe came to India by 1850 or so and infrastructure for that in the shape of good roads (Grand Trunk Road was^{not} only repaired by Lord Dalhousie but extended from Delhi to Peshawar, Indian P.W.D. was established

and by 1840 Agra to Bombay Road was completed) and advent of Railways by 1853, facilitated its birth in India. The Advent of steam power revolutionised the manufacturing processes in both the textile industries cotton and jute. The handicrafts in cotton suffered a lot, though it was of Superb quality. The Indian Cotton Mills in Bombay, Ahmedabad, Sholapur and Calcutta were established during the fifties of the 19th century to earn profits like Britain and Japan. Jute, which used to be exported raw, became profitable by its use at Indian mills which came into being from 1854 first at Serampur to many by 1875 at the bank of Hooghly in Bengal. Likewise, coal and iron industries also developed during this period.

The labour was at first local and consisted of low caste groups. They were poor, unorganised and illiterate. They were coming from different places speaking different languages with different modes of living having no sense of solidarity and in consequence no bargaining power. The contractual results were very unsatisfactory. The hours were long particularly in cotton ginning factories. Women and Children worked in factories as well as under ground in mines. The most of the industrialists were non-Indians. ¹⁷

To face the problem of dearth of labour, to solve their dispute in the favour of the industrialists, to punish those workers who deserted their work place in anguish and under inhuman conditions of work at site, the English people felt the need of legislations. The Indenture system of labour by which

17. Supra Note 16 p. 164.

Indian cheap labour could be exported to any British Colony all over the world was evolved by a regulation of 1837, and so many other legislations¹⁸ were passed to help the Britishers to exploit the Indian labour force.

The Impact of the first world war, the establishment of International Labour Organisation in 1919, the cult of Swadeshi and craze for independence in India forced the capitalists and the then government to realise that because of natural inequalities of bargaining powers possessed by the two constituents of the contract of employment, some protective labour laws are necessary to safeguard the interests of the workers. The prevailing malpractices in the shape of irregular payments, unauthorised deductions, long hours of work, exploitation of women and child workers, insanitary conditions of work place etc had to be curbed and eradicated. As such certain protective legislations¹⁹ had to be passed to show the welfare of the people as the aim of the state. The Protective legislations have been so pervasive and versatile that together with similar decisions of the courts, it has taken the shape and name of Industrial Jurisprudence, in India.

The theme of a welfare state and nationalism, the norms of democracy and humanitarian outlook for working class, have

18. The workmen Breach of Contract Act, 1859. Plantation Act, 1863, IPC 1862 Sec.490 to 492 making desertion a crime, The Indian Contract Act, 1872, replacing customary contractual Laws of India with predominantly English Laws (See Glad Hill, Alan, The Republic of India II Edn, p.291-292, Rankin, G.C. Background to Indian Law p. 191).

19. Factory Act 1881 to 1948 workmens Compensation Act, 1923; Trade Union Act, 1926 Payment of Wages Act, 1936, The Industrial Employment (Standing Orders) Act, 1946 Industrial Disputes Act, 1947, The Minimum Wages Act, 1948 etc.

changed the whole scenario of workers and their work place. The law has been changing and its interpretations and implementation have also changed to assert the right of the workers. But the awakening in the workers have made them more conscious of their rights and forgetful of duties, sending their skill to hibernation, when called upon to do their duties - a curse developing of late, is the new trend because of more protective laws.

C The Concept of Employment and the Tier Theory of Industrial Employment :

'Law of Employment' is a specie of law of contract, but happens to be more important than a simple contract because of its special texture and content. It deals with human aspirations and livelihood. It begins, continues and goes to hibernation every day during its operation and validity. It is not like a simple transaction of contract wherein if both the parties fulfil their obligations in their exercise of actions and find satisfaction out of the transaction, the contract comes to an end. But as pointed out by Dr. Freedland²⁰ in 1976, the law of employment consists of two tiers, one when both the parties agree to commence as employer and employee and the second when subsequently next day and onwards the employee presents himself for the work and the employer provides him all the conveniences eg tools, raw materials, instructions etc to start with. On the second day and onwards the first day contract continues. As such, the first tier

20 Freedland, M.R. : The Contract of Employment, London, 1976, p.76

at commencement and the second tier subsequently begins signifying the subsistence of the contract as employer and employee till it is repudiated, terminated or satisfactorily comes to an end

In 1981, this writer humbly submitted that contract of Employment in India contains three tiers. The third tier signifies continuation of obligations even after the Employment contract comes to an end. This third tier remains active when dispute of repudiation of contract comes to fore. This tier works in the shape of after-care of the employee in the shape of Pension, Gratuity, Provident Fund, Medical aid, Travelling privileges etc when the employee retires on reaching superannuation. Likewise, the Ex-employees are also bound to carry out certain obligations after the loss of active employment, due to retirement, resignation, termination etc. The ex-employees must not leak out the Trade-Secrets, list of customers etc of the previous employer. He is to refrain from competing with the previous employer's business or trade within the reasonable limits of time and territory.²¹

Though in 'The Structure of Employment Contract', Dr. Patrick Elias²² accepts the two tier structure of the contract of Employment as propounded by Freedland²³ but adds a third tier, namely, the employees obligation to serve the employer honestly and faithfully and not to damage the employers interest deliberately.

21. See S.S.MISRA : 'Jurisprudence of Service Contracts - 1981 University of Allahabad studies vol 13 p. 104.

22. (1982) 35 CLP 95

23. Supra Note 20

It is submitted that the third tier of Dr Tulas may be treated as included in the second tier while the contract subsists. The bonafide honest behaviour is implied and presumed from the side of either party of the contract. Why the third tier should entail in its purview the honesty, loyalty and sincerity of the employees only? It seems biased and over loaded with the assumptions against the employees only. The third tier as pointed out by this writer²⁴ consists of payments of Post-retiral benefits by the employer and keeping of secrets etc. by the employee and as such it is argued against third tier that they are obligations and ex-gratia type of privileges or bounties extended to the employees which cannot be enforced as contractual rights as they arise after the contractual ties are snapped between the parties because of superannuation etc. They have no legal basis for enforcement arising out of the initial contract of employment, rather new rights ensue because of factum of the original contract. Example is right of 'Pension' accrual²⁵ - regulated through statutes. Likewise contributory Provident Fund, Payment of Gratuity etc. are regulated through the aegis of statutes²⁶ and Central Government officials²⁷.

The statutes regulate the third tier but for eligibility the contractual subsistence for required period is necessary and

24 Supra Note 21

25 Bharat Petroleum Management State Pensioners V BPC Ltd (1988) 3 S C C 32

26 The Employees P.F. and Family Pension Fund Act 1952, amended in 1973. Labour P.F. Laws (Amendment) Act, 1971. The Payment of Gratuity Act 1972, Coal Mines and Mica Mines Labour Welfare Fund Act 1947 amended in 1972 etc.

27 Provident Fund Commissioner (Region wise)

the right of payment becomes reality only after the tie of contract is no more.

The enforceability of the right of Pension, Gratuity and Provident Fund etc is like a legal right because they have been recognised as such by the statutes which incorporate them. But these rights owe their applicability because of the factum of the existence of the contract of employment between the parties. The actual party to the contract or his/her nominee in case of death, gets the benefit of these social security measures in the shape of Pension/Family Pension, Provident Fund and Gratuity etc. The nexus with the party who actually was a party to the contract of employment has to be maintained and here lies the soul of the third tier of the contract of employment.

The retiral benefits may be claimed as a legal right - Though this legal right springs from a different source - a distinct statute - not as a sequel of original contractual obligations by which both the parties became employer and employee. But now, because of technological explosion, atleast, upper strata of employees visualise, at the time of entering into the employment contract, the post retiral benefits as well where post retiral benefits are in contemplation of both the parties at the initial stage of the contract of employment, legally it must be honoured by virtue of the initial contract alone. It may be pointed out that by providing through separate statutes the same benefits, the fulfilment of these post-retiral benefits stands doubly ensured, where at the initial stage parties had in their mind the post retiral benefits as well. Thus the first argument

against the third tier that it is not in any way connected with the original contract stands repelled

There may be a second argument against the third tier, that they arise only after the tie of relationship between the employer and employee is snapped or severed and as such do not form the part of the original contract because they cannot be enforced within the ambit of the original contract. This is also fallacious. As stated above, the post retiral benefits are to be paid or extended to the employee or his family or successors or heirs only - hence only operative and active portion of the original employment contract goes into hibernation after an employee retires. His duty to keep trade secrets²⁸, list of customers²⁹ and not to compete³⁰ within a reasonable territory and time span with his employer still continues hence snapping of ties is not a total snapping of tie, only certain aspects of the contractual tie are snapped when an employee retires. As such, third tier takes firmly its roots in the original contract and the second argument also stands repelled.

The ambit of the third tier of the employment contract becomes specified and clear, when we find the operational and active part of the employees obligation in an employment contract, as becoming silent, when he reaches the stage of retirement,

28. See Selwyn, M. Norman : Law of Employment, London, 1978 p. 26 (United Sterling Corporation V Felton 1974)

29. Robb V Green (1895) 2 QB 315 Wessex Dairies V Smith (1935) 2 KB 80.

30. Strange V Mann (1965) 1 All ER 1069 Little woods organisation Ltd V Harris (1978) 1 All ER 1026, Superintendence Co of India (P) Ltd V Krishan Murgai AIR (1980) SC 1717.

resignation or termination. Because of his past services, certain future benefits accrue, so root is in the past services and to make it sure, the future benefits are secured by another distinct and separate statute/rules agreements etc. This Umbrella will cover not all and sundry but only those who happened to be in active participation of the original obligation or to those who have some nexus of family or heirship with the original actual worker.

Inclusion of Post retiral benefits and certain obligations e.g. not to disclose or compete etc. by the employee, seems more sounder than the inclusion of loyalty, sincerity and faithfulness of the employee alone in the third tier of the Employment Contract, as suggested by Dr. Patrick Elias ³¹

The modern concept will follow after taking in consideration the Gandhian Thought on industrial employment.

D Gandhian Thoughts and its relevance to Industrial Employment :
(1869 to 1948)

During the days of freedom struggle, Gandhiji travelled whole of the India and gathered a practical knowledge about the Indian people, their avocations, position of agriculture, industry and commerce. The whole of the agricultural sector depended upon the vagaries of the weather, as irrigated agricultural land because of lack of canals and other facilities was very small in area. The pattern and mode of agriculture was traditional and yield per acre meagre.

31 The structure of Employment Contract (1982) 35 CLP 95.

The industries were nascent and were facing the competition well finished, cheap, foreign goods. The raw materials were taken from India cheaply and from those very raw materials finished goods were sent back to India crushing our industries as foreigners produced in large scale in prototype factory system getting the economy of large scale production and assured Indian market. Gandhiji realised this, and launched a "Swadeshi" (country made) agitation that, every Indian will use only Indian made articles. The concept of 'Khadi' and use of 'Charkha' was made the symbol of patriotism. Boycott of foreign goods and use of the self spun and woven cloth i.e. Khadi (it became a status symbol to wear Khadi afterwards) paved the way for saving and establishing the cotton industry - the biggest source of drainage-in India. This wave of nationalism encouraged other entrepreneurs to begin within other fields and other industries were started. To bring 'Ram Rajya' or achieve success, Gandhiji postulated shedding off certain whimsical conventions, customs and cult of superiority, work is worship. Everybody is important to society. No avocation was small or degrading. The practice of untouchability was deprecated by Gandhiji and those people who were so isolated in society, were accorded the status of 'Harijan' - the men of God, by him and he tried to assimilate them with the main stream of society by himself living among them.

To eradicate poverty and provide work to all, Gandhiji advocated self sufficiency to every village - by this meant each and every village will be producing each and everything necessary to exist. The small scale cottage industries were to

produce necessities of everyday life and provide work during slack season of agriculture. Factory system of production was earmarked for some specified items of national needs and importance. Machines were to be the servant of the mankind, man was not to be controlled and regulated by the machines. Machines were to be used but only to enhance the efficiency of the worker not to displace him, was the opinion of Gandhiji.

The Gandhian Model, which J.C. Kumarappa³² elaborated and advocated through hard-hitting articles in the Harijan and Gramudhyog Patrika aimed at a low energy, low capital, nature-friendly and decentralised development. Some of the assumptions, such as self-sufficiency of the village and restricted trade with the outside world, seem hardly practicable in the fast changing world of today. Then there are the complex economic issues, such as inflation, balance of payments, internal trade and the underground economy, for which the Gandhian Model may not have adequate answers. The Gandhians may argue that many of these problems would not have become so complex but the inordinate greed and indiscipline of individuals and sections of society entrapped in consumerism and that after all, Gandhi's economic framework also postulated a moral base.³³

As such, factory system of production, in big industrial houses, corporations and cartels where thousands of workers produce articles under one roof with the help of machines was not the view and dream of Gandhiji. Industrial strides of western

32 The Sunday Times of India, Lucknow JAN 17 1993, p.8
See Economy of Permanence of J.C. Kumarappa 1944
(Written in Jail)

33 Ibid.

pattern was not the target of industrial India, according to Gandhiji. He postulated that industry should be complementary to the agriculture and as such manageable by the farmers themselves.

But Gandhian thought did not affect industrial development in India. Even during the life time of Gandhiji, particularly after first world war i.e. during 1920 to 1948, the industrial strides in India was not decimal. The Cotton Textile Mills, Jute Mills, Iron industry, Coal mines, Woollen Mills etc. were using heavy plants and machineries and employing thousands of workers within one roof. The factory system and its concomittant evils were very much present in India, when Gandhiji was alive.

D. (i) Gandhiji's views on wages : Gandhiji has very rightly said -

" We cannot become rich merely by getting more wages, not is becoming wealthy all in all that you may get enough to make you happy, to make you truly religious that you may observe the eternal laws of ethics, that you may make good use of your earnings, that you may keep your houses clean and that you may educate your children" 34

It is submitted that the purpose to which wages is to be used, as suggested by Gandhiji coincides with the modern concept of 'Living Wages'.

D (ii) Gandhiji on Capital Labour Relations : How Labour and capital should behave ? The workers and the capitalists are the partners of their joint efforts in the industry. Each should care for the other. Workers demands should be commensurate with the employers capacity to pay. It should not

be based on their strength only. Likewise the capitalists should also neither linger nor ignore the demands of the workers which seems necessary and within their means. Mobilising forces by employers against workers is like raising an army of elephants against ants. The workers' starvation should, not be employers' opportunity.³⁵

'An owner never spoils his property, when you know that the mill is as much yours as of the mill owners, you will never damage your property. You will never angrily destroy cloth and machinery with a view to squaring your quarrel with the mill owners.'³⁶ The advice of Gandhiji depicts involvement of workers with the industry and shunning of violence. As regards the power of labour, Gandhiji's opinion was —

" No matter how oppressive the capitalists may be, those who guide the labour movement have themselves no idea of resources that labour can command and which capital can never command. If labour would only understand and recognise that capital is perfectly helpless without labour, labour will immediately come into its own." ³⁷

Gandhiji's Conceptual framework of industrial relations may be criticised on the ground that it is paternalistic in character and paternalism is incompatible with equality between labour and capital which he unhasitatingly professed. Further, paternalism at variance with Gandhiji's ideal of partnership between workers

35. See M.H. Desai, Righteous Struggle A chronicle of The Ahmedabad Textile Labourers fight for Justice, Ahmedabad, 1951 pp 46-48.

36 Young India, 4-8 1927 p. 248.

37 Young India, 14 1.1932 p. 17

and employers in the management of industrial undertakings. Since partnership may be a more distant and higher ideal than paternalism and the latter, more in tune with the present mind of parties to industrial relations on account of its long existence in India, is a preliminary to and the forerunner of partnership,^{37a} if allowed to take roots in India workers Participation in Management and Development of cooperative norms are the culmination of Gandhi's dream.

- iii) Gandhiji's view on Strikes — Gandhiji believed that it should be only resorted to when it became a must. He despised strikes for political purposes by the workers. A strike, after negotiations, arbitration etc. should not have failed, must fulfil the following tests — that its cause being just, that strikers are unanimous, that it is non-violent, that strikers are able to maintain themselves during strike without wages and that when enough labour is alternatively, available to replace strikers, the remedy is resignation not strike.³⁸ Self maintenance by workers during a strike by finding their own support was an indispensable rule and secret of success³⁹ of strikes conducted by Gandhiji. Gandhiji regarded strike as the inherent right of workers but it was criminal to continue it after the arbitration for settlement of demands was accepted.⁴⁰

37 (a) Paresb Majumdar, An Anatomy of Peaceful Industrial Relations, Bombay 1973 p. - 49.

38 Young India - 16.2.1921 p. 52.

39. Speeches and writings of Mahatma Gandhi G.A. Nateshan Company (4rth Edn) pp 1045-47.

40. Young India 19 2 1929 p 308

- iv) Gandhi's Opinion on Trusteeship : The concept of Trusteeship enjoins that a person should possess wealth and money more than his needs as a trustee of the society in which he lives. Gandhiji did not agree to use even a minimum of violence by the State to coerce a citizen when he refuses to become the Trustee of his wealth for the society. The state represents violence in a concentrated and organized form. The individual has a soul but as the state is a soulless machine, it can never be weaned from the violence, once it is allowed. Hence the doctrine of trusteeship was preferred by Gandhiji.⁴¹

The erstwhile capitalists, property owning class will consider itself trustee on behalf of the proletariat. The change is purely on the subjective sphere, the objective conditions of production will continue by remaining as they were in capitalism. The class appropriation of surplus with trust production will continue in a pious guise, will mean larger and larger accumulations of capital on the one hand and pauperisation of the masses on the other. These evils cannot be banished by wishing a change in the hearts and minds of the owners of property.⁴² This is one of the dimensions of trusteeship concept.

Because of state patronage, legislations, judicial decisions and general awareness of the workers, the wretched state of affairs of the workers that prevailed when Gandhiji

41 N.K. Bose : Studies in Gandhism, Calcutta, 1947 pp. 107-108

42 Mahadeo Prasad "Social Philosophy of Mahatma Gandhi", Gorakhpur, 1958, p 195.

mooted the idea of trusteeship, is no more. The situation has changed and we have practically experienced the doctrine. Now instead of 'Trusteeship' the 'participation' of workers in management' is being advocated and pursued. The cult of trusteeship requires a moral base and there is no apparent regulatory device to check and implement it.

- V View of Gandhiji on Satyagraha : The cult of non-violence, non-cooperation which Gandhiji called as Satyagraha was the recommended means through which worker was to achieve and press for his genuine demands. According to Gandhiji, the technique of resisting the evil and awakening the man in man was non-violent non-cooperation.⁴³

Clausewitz's principles of war, namely

" retaining the initiative using the defensive as the decisive form of action, concentration of force at the decisive point, determination of that point, the superiority of the moral factor to purely material resources, the proper relation between attack and defence and the will to destroy"

are all, according to Richarch Gregg retained in Satyagraha⁴⁴

'Demand of the satyagrahi should be practical and feasible. Submit your demand constantly to public examination and criticism. All that is found not absolutely essential should not be made a cause of satyagraha.'⁴⁵ A Satyagrahi should never lose hope so long as there is slightest door left open for it, Gandhiji's

43. Harijan 20 4.1940 p. 97.

44. R.B.Gregg 'The Power of Non-Violence', Ahmedabad, 1957 p.113.

45 N.K.Bose - Studies in Gandhism p. 134.

success with General Smutts, in South Africa is the example, quoted, by Gandhiji himself ⁴⁶ The idea underlying the Satyagraha is to awaken the sense of justice in the wrong doer and to convert him.

To sum up, the whole Gandhian Philosophy in context to workers and industrial employment has been summarised by Justice S.M.Shelat in the foreword of 'An Anatomy of peaceful Industrial Relations' ⁴⁷ as follows —

" The leadership of the Textile Labour Association having remained with some of the close adherents of Gandhiji and its work being therefore conducted under his guidance and blessings, the principles of Gandhian philosophy, a non-violence, Justness of demands, fair play as the means of the struggle, voluntary arbitration, co-existence of employers and employees as instruments of national economy, the removal of master and servant relationship, voluntary trusteeship etc. were tacitly accepted. Such an acceptance is demonstrated in the object clause of the constitution of the textile Labour Association." ⁴⁸

Regarding relevance of Gandhian Thought to present industrial employment, it is submitted that the moral base of Gandhian Thought is expected to inculcate a complementary outlook between the employer and employees to bury their dissensions and buttressing a work-culture to grow up for a better industrial relations. Further, establishing of industries to rural regions

46 Gopi Nath Dhavan : The Political Philosophy of Mahatma Gandhi, Ahmedabad, 1957, p. 137.

47. Paresh Majumdar [^] 'An Anatomy of Peaceful Industrial Relations,' N M Tripathi [^] Bombay, 1973.

48. Ibid p. VII (The Textile Labour Association was established in 1920 at Ahmedabad).

will stop exodus to cities and in consequence curtail the problems of city-dwellers because of inflated population, if the thought of Gandhiji is implemented regarding establishing of new industries in India. The development and extension of infrastructure to untapped and rural regions of the country, no doubt is a need, if we think to develop evenly the industrial growth of the country even without Gandhian Thought, at present So Gandhiji cannot be ignored.

E. The Modern Concept of Industrial Employment :

E 1 - General : The contract of employment no more remains a free zone where under the garb of freedom of contract, both the parties at least in Theory, used to bargain their terms and conditions. Because of increasing democratic waves and socialist norms of distribution of wealth or distributive social justice where by all the partners of production must get their equitable share and the enunciation of the Cult of welfare state, the problems of workers are no more the problems of workers alone. The present society is so knitted and interdependent, that any part if remains unsatisfied, the whole society feels the pinch and equilibrium is disturbed. The forces of peace and progress are stalled and as such state intervenes. Now, more or less every activity concerning industrial employment is regulated, controlled and supervised by the state or its agency. With the ever increasing state regulation and laws about industrial undertakings and the approach of judiciary to interpret laws generally in the favour of the workmen to provide job security, social justice and industrial harmony, the contract of

employment is increasingly approaching the pedestal of 'Status', rather than remaining purely as a matter of contract between the employer and the employee ⁴⁹ Again, nowadays from the analysis of the nature of the contract of employment, it appears that the employment relationship resembles "a marriage relationship" in which both the employers and the employees have the liberty to enter the 'blessed state', but if the employer wants to determine the relationship he does not have the freedom to do so except on the grounds recognised under the law, like obtaining divorce from the other party. ⁵⁰

The right of the employer to hire and fire has no place in the modern concept of employment rather human element in the workers has found its recognition instead.

The Employer and Employee relationship is becoming that of status in place of contractual seems correct in the long run If we analyse the relationship it would emerge, that at the initial stage the tie begins with contractual trappings, but once it comes into existence the law takes care of its every activity - the relationship is nurtured, protected and regulated by the law and as such the 'Status' comes into being, and we may easily call the employee-employer relationship - a relationship of status, not of contract. Contractual obligations are over-shadowed by statutory obligations and sometimes unilateral actions of one party become the obligation of the other party e.g. Model standing orders or

49. R.H.Graveson ; Status in the Common Law, 1950 p 50.

50. C.D.Drake, ; Wage-Slave or Entrepreneur ? (1968) 31 MLR 408 at 421

Government orders for Government servants changing their terms and conditions of service

While entering into the contract of employment, every able person is not to be discriminated against on the point of sex, caste, race, colour, creed, etc yet some protective discrimination is allowed on the basis of caste and domicile certain scheduled castes, scheduled tribes and backward classes are given some reservation so that their lot may improve by getting that employment The basis of domicile is preferred to engage the 'sons of the soil' but this principle will not work where expert knowledge is required, and the 'sons of the soil' lack that expertise, likewise the new hands to be recruited should be sponsored by the 'Employment Exchanges' to curb the possibility of nepotism and other irregularities But the employer to scuttle this provision appoints casual workers on adhoc basis To curb this malpractice, the highest court has directed that each casual worker must be regularised after working atleast 240 days and no attempt should be made to remove the worker's name from the rolls' dishonestly to deprive him of completion of 240 days ⁵¹

E.ii - New Trends : The Educational background, training, exposure to technical developments have given to the workers an attitude of scientific temperament and making them fully conscious of their rights The employer is no more a dictator of his terms The Trade unionism and concerted efforts of the workers in

51 See Randhir Singh V Union of India AIR 1982 SC 1879,
Surinder Singh V Engineer CPWD AIR 1986 SC 584
H.D.Singh V Reserve Bank of India AIR 1986 SC 132

imposing strikes of various kinds also compels the employer to come to the terms with the workers

In subsisting the contract of employment the principle of cooperation plays a vital role. Not only for daytoday working, but for introducing changes, reforms and improvement in the establishment, the cooperation of the worker becomes a must. Periodical wage revision and review of other facilities requires cooperation.

Earmarking the establishment of research and development section together with facilities of training and education, now has become a must to cope with new technological developments for each unit, hence the modern employment, entails that workers must be prepared to switchover to new modes and methods of productions, as it would avoid the constraints of retrenchment and less wages

The workers of India had been 'right' conscious and oblivious of their duty and their collective bargaining procedures sometimes become irresponsible. There is no work culture. To instil a proper sense of duty and behave responsibly in collective actions, the workers Education programme is in vogue since 1959. If the employer is taking proper care of his workers, he is taking care of his means of production - this is the modern view.

While retrenching the extra hand, the norm of 'first come last go' or 'Last in first go' is to be observed. Even in closure of his concern, the employer is not free. He has to offer the workers the option to run the concern and in court the worker's cause is to be heard before a final closure is to be allowed.⁵²

⁵² National Textile Workers union V P.R., Ram Krishnan (1983)
1 SCC 2798

The right to property of the employer is subject to the right of the livelihood of the workers, after the 44th amendment of the constitution since 20 6 1979 ⁵³

The the concept of natural justice, retrenchment procedure, consciousness of court, public policy etc are getting their due importance in the working and format of contract of employment in modern times. The worker is not mere a cog in the wheels of production, now he is an active participant in the management, getting a feeling of involvement with the concern in which he is working. Participation of workers in management is now not a myth. It is a fact. And, this curtails many a hypothetical dissensions and confusions. ⁵⁴

Now the social status of workers, where they happen to be masters of certain expertise is in no way lesser than any other 'white-collared' incumbent.

So under the modern view of contract of employment, the worker is a conscious factor of production and deserves full care and attention not only at the worksite but also there after. Those employers who are taking proper care of their workers are earning good profits and facing less 'Labour Troubles'.

Whatever reforms or good strides in living standards of workers and working conditions of industrial establishments are

53 This amendment puts right of property as a legal and constitutional right only while U/Art. 21, Life and Liberty still continue to be a fundamental right

54. The workers presume that employers always conceal true profits but when their representative is in management - this presumption is rebutted - particularly at the time of Bonus declaration

nowadays found, happen to be the result of efforts of organised labour activities. So wherever, the working class is not organised because of less numbers or 'heterogeneous' nature of their origin or multi unionism in one industrial establishment, whereby 'divide and rule' is possible, the employer fructifies the situation by not granting the due demands and amenities. As such, workers must organise themselves wherever they are.

iii) Certain dimensions of new Trend New Technology and Role of workers :

The impact of computers, Robots and other automatic machines will surely affect the unskilled workers if they fail to educate themselves in the new pattern and the technological strides

The labour force has to be given a new role, distinct from the role of pre-industrial society. This new role requires adequate and sufficient training to perform them. It must be taught to work under a different pattern of rules and relationship.⁵⁵ The industrialisation requires the study of labour markets, changing pattern of labour development, the enhancement of training and skill, occupational mobility, growth and evaluation of new wage structure of labour and adjustment of labour force to many new obligations and routines.⁵⁶

55. Morris, David Morris, The Emergence of an Industrial Labour Force in India : A Study of the Bombay Cotton Mills - 1854-1947, p 198

56. Ibid - p 1.

The world is expanding very fast and there is no place for a purely an unskilled worker who does not want to change. The large-scale use of machines will terminate and diminish the demands of such labour. The modern worker must have some basic education and scientific bent of mind, some technical training to cope with the machines of the modern era.

The expectations of the industrialization will be fulfilled only when the part and role of labour is effectively played by the workers with due home-work. 'Hard and efficient work on one hand and the avoidance of indiscipline on the other will be needed for achieving the goal which the community desires to achieve.'⁵⁷

E.

iv Risk Management and Modern Employment Law :

Concept of industrial risk management cannot be ignored in context to modern industrial employment. The large projects in chemicals, refineries and power at various stages of implementation, compel us to pay more attention to the consequences of the environment within which they operate. The modern corporation carries a portfolio of risk. They include risks associated with industrial safety, process technology, hazard insurance, materials management and any other activity that could result in losses. They are assessed for severity, probability and frequency. Till recently environment protection and public safety were ignored by productive units. Today they have realised that insurance and insurance

57 IInd Five Year Plan (1956) p. 576.

58 ~~Proceedings of the Ministry of Labour, Government of India, 1957-58, 1958-59~~

portfolio management are no longer sufficient. With cases like Bhopal or the Oleum gas leak from the Sri Ram Foods and Fertilisers Factory in Delhi, public liability is becoming an important factor. In both the cases, penalties were imposed on the owners. The Supreme Court also held that,

" an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and industry in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of the hazardous or inherently dangerous nature . "58

In other words, potentially unlimited liability has been fixed on the productive unit making its risk unlimited.

Accidents may be simple covering the factory or the complex one covering the factory as well as outside the factory. Besides, there may be natural calamities in the shape of floods, earthquakes and the like, putting the unit at an unexpected loss and reconstruction. Today 'risk' is accepted and understood as the probability of an unexpected event that results in financial losses.

Safety, insurance and risk management have their own specific roles to play, as do the other vital functions of production, finance and marketing. Institutions such as the World Bank, appoint consultants to check risk management audits as a pre-condition for loans sanctions for mega projects.

As companies globalise, the projects especially large ones that involve greater complexities, increase, newer risks surface

Technological advance has brought in threats of obsolescence, which itself is a big risk. But the problem becomes a little complicated for larger facilities like chemical plants, which carries inherently larger risks. As such, in case of any mishap, the impact on the unit of production also becomes larger.

The Guiding principle is ² to avoid risk to the plant, people and the environment from ill conceived or badly executed plants changes, the changes in process plants, utilities storage facilities, structures and building. They also include software changes, instrument replacements, Temperature, pressure and overall process and process material controls.

The risk management is becoming very essential part of management, as sometimes, its improper handling may lead to the closure of the unit itself. Likewise, to cope with the loss of expertise and trained personnel wherever the curse of occupational disease so culminates, the risk management requires proper training of new incumbents, proper medical care of victims workers of occupational diseases and raising of a fund or Insurance ⁵⁹ to look after their aftermath and initiation of some protective methods so that disease may not cause its spell or its severity may be reduced. Since risk management concerns with workers health and safety also it is very much relevant for a modern contract of employment.

59 K M Shama V Bharat Electronics Limited (1987) 3 SCC 231 whereby S.C. ordered a coverage of appropriate insurance over and above general insurance for all the workers and officers of the corporation to cope with X-ray radiation, though no trace of injury to their health, was visible.

F. Law of Contract and Contract of Employment :

Conceptually contract of employment is a species of law of contract but it is something more than a simple set of contract. All the elements of a valid contract must be there. The contract of employment may come into existence by an express written agreement or oral agreement or impliedly by conduct of the parties. There must be as a special trait of Employment contract, an intention between the parties to create a legal relationship and both should be interested to continue it. Moreover, the cult of cooperation, care and fidelity must also be observed, to make the relationship fruitful. Some writers have propounded that because of legal protection to workers position by the legislature and the judiciary, the relationship of Employer and employee is more akin to 'Status' rather than contractual after the initial stage.⁶⁰

F.1 - Formation of Contract : Formation of the contract of employment by conduct involves two problems, firstly, the broad problem of ascertaining the specific terms and secondly, the formation of contract itself is suspected where the mutual obligation to continue the contract lacks. This may happen where the old terms and conditions are withdrawn and new terms and conditions are imposed and the worker has worked in new conditions for a very short period.⁶¹

60 R.H.Graveson status in Common Law (1950) p. 50.

61 Sheet Metal Components Ltd V Pleomridge (1974)
1 CR 373

Again where an employee works for short period for a new employer where a new enterprise has been acquired by that new employer⁶² The court in both the above cases denied the relationship of employer-employee to avoid statutory redundancy payment to the workers -but strictly speaking there was a contract of employment though of a very short duration

The express contract may be oral or written It may be for a future date to commence with If there is breach in such a contract of a future date, the breach will be anticipatory breach provided it occurs before the actual date of commencement.⁶³

A valid contract of employment must have all the above elements but sometimes apparently a valid contract, because of lack of free consent becomes a source of exploitation e.g the system of bonded labour, in quarries, brick kilns, plantations etc wherein at first some money is advanced and to repay that money the worker puts in his labour with the lender Because of the exorbitant interest and low wages, the debtor worker never sees the day when he becomes free from the loan The State through a statute⁶⁴ is trying to make them free and rehabilitate

F ii- Minor's Contract : Because of lack of capacity a person below 18 years of age generally and 21 years of age in case of courts ward, is deemed to be a minor and incapable of giving

62 Ubsdell V Paterson (1973) 1CR 86

63 Hochester V De Latour (1855) 2 E & B 678

64 The Bonded Labour system (Abolition) Act, 1976.

free consent. The minors contract is treated void ab initio⁶⁵ But irony of the fact is that children below the age of majority are freely engaged in industrial employment as well as elsewhere. All India Survey of operation Research Group 1983 estimated 44 million child workers in India.⁶⁶

Children are mainly employed in glass bangle industry, Jewellery, slate making, carpet making, brick kiln and match factories of Shivakashi. They work in hazardous occupations without safety arrangements for long hours. Many statutes right from Factories Act 1881 to 1912 and now 1948 to child labour (Regulation and Prohibition) Act, 1986 nearly 14 statutes have been passed in India to prohibit the child labour.⁶⁷ In spite of these legislations the child labour in India is flourishing because of non-conformity and various loopholes in these laws. The Employers are equally notorious for flouting all labour laws with impunity.⁶⁸

The Supreme Court of India, on its part, has tried to ameliorate the lot of working children. In Peoples Union for Democratic Rights V Union of India⁶⁹ the low wages to children employed in construction of Asian Game Complex was despised. Again the Salal Hydro Project V State of J & K⁷⁰ the engagement of children as labour and their low wages was criticised by the Supreme Court. Recently in M C Mehta V State of Tamil Nadu⁷¹ to

65 Mohiri Bibi V Dharmo Das Ghosh (1903) 301A 114 (PC)

66 Narendra Prasad "Child Labour in India" Yojana 1-15 1990, p 12

67 Ibid

68 Indian Worker Vol XXXIV No 25 September 15 1986 p 7

69 AIR 1982 SC 1473

70 AIR 1989 SC 117.

71 AIR 1991 SC 417

end the exploitation of children in Match factories of Shivakashi, the Supreme Court directed to ensure the payment of minimum wages and other facilities including education and insurance etc invoking the Article 39 (f) and Art 45 of the Constitution.

The Minors Contract in Industrial employment comes into being through their guardians and sometimes under the cover of Apprenticeship Act, 1850 and now of 1961 amended in 1973, whereby engagement of a person below the prohibited age (14 years) becomes legal in the garb of training

F iii - Intention to create contractual relationship and its continuity :

The contract of employment demands renewal of this relationship daily after the first beginning of the contract of employment if both the parties intend to carry on with the relationship. The temporary absence leave or hurt on duty of the worker will not snap the tie. Likewise lack of raw material breakdown of a machinery, over production etc will not, if for these reasons the worker is laid off, break the tie of employment. Retrenchment, Removal, Dismissal of the worker, closure of the factory etc may lead to snapping of the tie of employment contract. This tie lasts till it is allowed to continue and even thereafter for retiral benefits and obligations.

F iv - Requirement of Free Consent of Parties to the Employment Contract :

The consent for a valid contract must be free from coercion, misrepresentation, fraud, undue influence, and mistake

of fact by both the parties. If the consent is caused by any of these factors, the contract will be voidable at the option of that party whose consent was so caused, except in the case of mistake. If both the parties are in mistake of an essential fact of the contract, the contract becomes void. A voidable contract remains quite valid so long as it is not opted out as invalid. So in cases, of contract of employment even if the consent of the worker is obtained through coercion, misrepresentation, fraud or undue influence, the contract is simply voidable and since the worker does not opt for repudiation, because of poverty etc the contract continues as valid.

Likewise in cases where a worker commits fraud in reference to his age or qualification by producing false certificates, the employer may terminate the contract or may retain him. In case the employer promises to pay more and pays less, the worker may leave the job and sue for balance and damages or may continue on the lesser payment than promised.

The case of mistake of identity or impersonation will be covered under the fraud committed by the worker and the employer may terminate the contract of employment or may validate the contract afresh with correct name and identity. To safeguard the interests of workers who are enticed for foreign countries or for distant places, Indian Emigration Act, 1985 has been passed whereby licenced sponsoring Agencies are devised for accountability.

F V - The Element of Consideration in Employment Contract In

Contract of employment, the worker sells his labour and the employer purchases it by paying wages to the worker. Though, the adequacy of consideration does not affect the validity of a contract, yet, in employment contract, since the worker happens to be a human being, a voter and centre of all welfare activity of a welfare state, the exploitation of the worker by the employer through less wages and long hours of duty cannot be allowed to go unbridled. As such a wage policy covering minimum wages, its timely payment without undue deductions, removal of disparity on the basis of sex, race, creed, caste etc together with an incentive for higher productivity, punctuality etc may help good relations among the employees and the employer. In India many statutes⁷² have been passed to keep^{peace} on this point.

Since wages happens to be the one of the main item of cost of production so employer always tries to get his product at lesser costs by paying lesser wages and the worker always wants more wages because more money in the shape of wages means more amenities. This struggle of interests is endless and a welfare state harmonises this struggle through the means of legislations, reconciliations, arbitration and even by the aegis of courts and tribunals.

The element of consideration in contract of employment gives rise to the following problems also —

- a) Equal pay for equal work
- b) Payment of overtime

⁷² Payment of wages Act, 1936, Minimum Wages Act, 1948, Industrial Disputes Act, 1947 etc.

- c) Higher allowance and less basic wage
- d) Payment of Bonus
- a) Equal pay for equal work — has been ordained as a directive principle of state policy⁷³ in the constitution but to reduce cost and earn more profits, employers, flout this norm in various ways. The employment of Casual/Badli/daily wagers and women and children for the same job but with lesser payment is an open secret.

As discussed before, the casual labourers are needed to cope with sudden casualties of staff or at festivals or for sudden spurt of demand of products or as a margin staff to allow leave etc. to permanent staff. They are cheap cost wise as only daily wages sans all other allowances are paid to them. Moreover they are simple, obedient and available in abundance. These daily wage earners perform the same job as that of the permanent workers but are deprived of the similar payment. Their strength is more in proportion to the permanent workers and posts of permanent nature are allowed to remain vacant, thus stalling the chances of new recruits to become permanent. There should be some limit roughly not more than 10% to 12% of the engagement of casual workers to the strength of permanent workers. New needs and requirements of staff should be fulfilled through permanent vacancy. The Judicial response has been in favour of these casual workers so far as their regularisation, striking off the name from the rolls, their claim for better

73 Article 39 (d) Equal Remuneration Act, 1976

treatment in removal etc is concerned ⁷⁴

The women workers are also discriminated so far as their wages is concerned as against the men workers. Women are paid less than the men counter part for the same job on the filmsy ground that they are weaker and do less work. To obviate this, the Equal Remuneration Act, 1976 has been passed. This Act is insufficient and ineffective, ⁷⁵ as it provides for payment of equal remuneration to male and female workers, but it does not guarantee equal pay for equal work amongmen ⁷⁵. National Commission on women, it is hoped, will look for their all out welfare.

b) Payment of Over Time - Overtime is described ~~as~~ as

" work which the employee is requested to do over and above his contractual stint and for which he is remunerated at a higher rate because of the additional and voluntary character of work " ⁷⁶

If it is provided in the contract of employment, and it is within the statutory hours of employment, the workers, cannot refuse to work overtime and if some one refuses he may be taken to task for breach of contract and discipline ⁷⁷. The Supreme Court in M/s Phillips India Ltd. V Labour Court ⁷⁸ Madras

⁷⁴ See Note 51 Supra, Mittal, J.K. "Casual Labour" and "equal pay for equal work" 28 JILI (1986), p. 260.

⁷⁵. Y.Vishmupriya, "Equal pay for Equal work in India, Myth and Reality" (1991) 1 SCJ pp 83-85.

⁷⁶ Freedland M R. The Contract of Employment, Oxford 1976, p. 17

⁷⁷ The Industrial Employment (Standing Orders) Act, 1946 and Minimum Hours' of (Employment) Act 1936

⁷⁸ AIR 1985 SC 1034.

has held that

" overtime in context of working hours means period in excess of prescribed working hours "

Overtime working should not be made a routine, otherwise during their normal hours of duty, workers will loiter and work only during the overtime period and unnecessary supervision costs will escalate.

In Indian Oxygen Ltd V Their workmen,⁷⁹ the prescribed hours of working by the concern were 39 hours per week while the statute prescribed 48 hours per week as the minimum prescribed working hours. The contention that more than 39 hours and upto 48 hours - the limit of statute - carries no overtime wages, was rejected by the Supreme Court. The reason being that if it is permitted, it would mean indirectly increasing the working hours and consequently alter the condition of service unilaterally. Hence, it was held that work from 39 hours to 48 hours is overtime and should be paid @ 1½ times of the ordinary wages and work in excess of 48 hours should be paid double the ordinary wages as prescribed by the statute.⁸⁰

- c) Higher Allowances and Less Basic Wage — Some industrial units pay to their workers, the basic wages at a very lower rate (not below the minimum wages) but other allowances at a higher rate making the total pay packet comparable with other units which have a proper correlation with basic wages and other allowances when

79 AIR 1969 SC 306

80. See AK Basu V ICI (India) Pvt. Ltd, (1975) Lab LJ 239 (Cal), Carew & Co. Ltd V Shailja Kanti Chatterjee (1972) 2 Lab LJ 359 Railway Employees Co V K S. Narayanan (1972) 2 Lab LJ 385.

there is a demand for wage revision such units revise allowances heavily not the wages so favourably This is a sort of cheating The Industrialists, keeping an eye on the future payments, fix the rate of basic wages just above the minimum wages to avoid flouting of the Act⁸¹ and to keep the future liabilities within their desired limits This is, because, all the calculations are made on the basis of basic wages and if the basic wages is lesser, the calculations based on it would also be lesser hence the future liability of gratuity, provident fund, pension etc. would be lesser The trade unions, conciliatory machineries Arbitrators, Reviewers of wage awards should see that by this unscrupulous means the innocent worker is not deprived of his due payments.

- d) Payment of Bonus : Now it is a settled fact that bonus is regarded as deferred wages and every industrial concern pays it, treating it as a part of wages Every industrial worker and non-industrial worker expects as a lump-sum to be paid after 12 months of working, a months wages as bonus to cope with festival expenditures To tackle every year's dispute for quantum of bonus in India, Payment of Bonus Act, 1965 has been passed and to maintain productivity the bonus has been linked with productivity Every year, according to production in a given concern 'Bonus' is declared Paying capacity of the concern is irrelevant If there is no production the minimum bonus as per statute is declared otherwise, the quantum increases with the increase of productivity Bonus, thus forms a part of consideration of

81 Minimum wages Act, 1948.

contract of employment Its proper handling leads to good production and peace in the general industrial climate

G Difference between the Contract of Employment and Contract for Employment :

i) General :

Broadly speaking in contract of employment, there is direct relationship between the employer and employee and the task to perform is given to the employee and employer holds some supervision and control over the employee while in contract for employment, a contractor is assigned the desired task who employs employees to perform that task The employer-employee relationship, thus comes in between contractor and his employees and the original task giver has no such relationship with those workers of the contractor. The control and supervision over the workers is exercised by the contractor, the Immediate employer not by the task-giver the Principal employer

Further in situations where the task is not being carried out properly even after due discussion, in the case of contract for employment, the contract can only be revoked and damages claimed but in case of contract of employment, the employee can be chastised and desired results obtained because of the direct relationship of employer and employee If the employee does not improve then he may be terminated and a new one, more qualified and efficient appointed to fulfil the task

Four general indicia have emerged from the decisions as attributes of contract of employment⁸², the employers power firstly, of selection of his employees secondly, the payment of wages or other remuneration, thirdly to control the method of doing the work and fourthly suspension or dismissal of the employee

A contract of employment, might still exist even though one or more of these elements were absent or present in an untypical form. The principal requirement was the right of control - a right, critical and decisive of the legal quality of relationship⁸³

It has been pointed out that these indicia were affected both by trade union rules and by statutory rules and provisions respecting choice of men and the power of suspension or dismissal. The statement that 'Selection, payment and control' are 'inevitable' in many contract of employment is clearly open to reconsideration⁸⁴

ii) Tests of Differentiation :

To locate the relationship of employer - employee, certain tests have been devised. They are as follows -

- a) Control Test - This envisages not only what to do but also how to do it, if it was so, a contract of service existed⁸⁵. But this test fails, where an expert is employed.

82 See Short V J AND W Handerson Ltd (1946) 62 TLR 927.

83 Park and Wilson V Clyde Coal Co Ltd (1928) AC 121 at 159.

84 F.R.Batt ; The Law of Master and Servant, London, 1967, p 4

85 Yewens V Noaks (1980) 6 QBD 530 CA

- b) Organisational Test — To treat the employee as a part of the business and his work an integral part of the business, was suggested by Lord Denning⁸⁶ to cover the employees in whose case control test seems inappropriate
- c) Multiple Test — Since any single test seems inadequate this test is applied by taking all the surrounding features.⁸⁷
- d) Entrepreneurial Test — In this test it is seen whether the worker is owning the business, with his risk, helpers and financial investment etc where a company employed women on part time basis to do market research, they could work as they choose but according to a set pattern, it was held that the women were employed and not employed in business 'on their own'.⁸⁸

The relationship of employer and employee cannot be changed by adopting devices of self employed treatment or by entering into contract to be treated as self employed. In such cases the primary test of control is applied to decide the relationship.⁸⁹

In India, the 'Supervision and Control' test is regarded as the primary test.⁹⁰ The Bidi rolling by workers at their

86. Stevenson, Jordan and Harrison Ltd V MacDonald and Evans (1952) 1 TLR 101

87 See Ready Mixed Concrete V Minister of Pensions (1968) 1 All ER 433

88 Market Investigation Ltd V Minister of Social Security (1968) 3 All ER 732

89 See Maurice Graham Ltd V Brimswick (1974) 16 KIR 158
Davis V New England College of Arundal (1977) 1TR 278
Massey V Crown Life Insurance Co (1978) 2 All ER 576

90. Shiva Nand Sharma V Punjab National Bank Ltd (1955) 1 LLJ 688 (SC) Dharangadhara Chemicals Ltd V State of Saurashtra (1957) 1 LLJ 477 (SC)

home was first treated not with in the purview of section 2 (1) of the factories Act, but ultimately they were treated as workers instead of independent contractors, or employees of independent contractors ⁹¹ The control and supervision, in a given case depend on a variety of factors such as the nature of the work done by a person, the circumstances, in which and the place where he is asked or permitted to do the work, the skill or technique or method if any required of him in performance of the work, the status and the number of persons engaged in performance of the work and in a large number of cases on the mode or manner of remuneration adopted in respect of the particular work required of a person ⁹² In appeal, the Supreme Court clarified in the same case that —

" The control of the management, which is a necessary element of the relationship of master and servant is not directed towards providing or dictating the nature of the article to be produced or the work to be done, but refers to other incidents having a bearing on the process of work the person carries out in the execution of the work The manner of work is to be distinguished from the type of work to be performed." ⁹³

In Hussain Bhoi, V Alath Factory Tezhilali Union ⁹⁴ Justice Krishna Iyer of Supreme Court, found that even the workers of the contractor are the workers of the main employer by raising the

91. See Shanker Balaji Waje V State of Maharashtra (1962) 1 LLJ 119 (SC) State of Kerala V VM Patel (1961) 1 LLJ 549 (SC) and Birdhichand Sharma V First Civil Judge (1961) 11 LLJ 86 (SC) V P Gopal Roa V Public Prosecutor (1970) 11 LLJ 59 (SC)

92 See State V Shanker Balaji Waje (1961) II LLJ 8 (13) Bom (DB)

93 See Shanker Balaji Waje V State of Maharashtra (1962) 1 LLJ 119 (SC)

94 (1978) Lab IC 1264 (SC)

protection of Articles 311, 14, 15 and 16 is given while in Military side the constitutional safeguards are barred as per Article 33 but they are allowed to have their own service code and martial law,⁹⁵ because of maintenance of discipline and security and court can probe malafide in their implementation

- b) Those Government servants who held certain constitutional posts (such as High Court and Supreme Court Judges, Election Commissioner, Auditor and Comptroller General of India etc.) under the 'doctrine of upholding of the Constitution' and good behaviour and have the protection of 'impeachment' by the Parliament for their removal
- c) Those servants whose tenure is for a fixed period under a contract or a renewable contract, if they are dismissed before the expiry of their terms of contract, they can claim only damages, not restitution of their services. Article 311 is not applicable to their case, though concept of natural justice is allowed to be invoked⁹⁶.
- d) Those servants who are deemed as government servants because of liberal interpretation of 'other authorities' in Article 12 of the Constitution. They enjoy the application of Articles 14, 15, 16 and 21 to their claim but are not given the benefits of procedural protection of Article 311, because of corporate veil of separate entity other than the government itself happening to be their employer and courts are reluctant to pierce that veil for this purpose

95. Military Act, 1950 and Military rules 1954 in Indian Context

96. *Rajazutsi V Union of India* (1975) 1 SCR 311.

veil, that the real employer is the management not the immediate contractor. It is submitted that this judgement was in the zeal to protect the interests of the workers which is usually defeated by labelling them contractor's employee

The law as obtained in English legal system for distinguishing an employee with an independent contractor applies in India also with local changes wherever necessary

H Difference between Industrial and Non-Industrial workers :

1) General :

An industrial worker² is one who sells his labour for production processes and its cognate activities and is usually engaged by industrial establishments. Now-a-days his relationship with the employer is emerging as a status because of protections of laws available to him. The distinction of protection of laws available to an Industrial worker and a non-industrial worker is the main criteria to decide the difference between an industrial and non-industrial worker.

ii) Categories of Non-Industrial workers :

Broadly speaking non-industrial workers may be categorised as follows - Firstly Domestic workers, Secondly Agricultural workers and Thirdly Government Servants. The Government servants may again, be classified as under -

- a) Those Government servants who hold their tenure of post under the 'Doctrine of Pleasure', in civil side as well as in military side with difference that in civil side

The Domestic Servants and agricultural workers are an unorganised poor, illiterate lot, resembling the casual or daily wage worker of industrial stream. Domestic workers have some unions in big cities, where they are needed most, but the awakening is nascent. The agricultural workers, having a seasonal occupation, prefer to migrate to other places for odd jobs and are an easy prey of exploiters. The government is visualising to accord these workers an industrial status by categorising agriculture as industry, until now a very scant attention (Legislatively)⁹⁷ has been paid to them.

iii) Difference through protection of laws :

To differentiate an industrial from non-industrial worker the procedural safeguards available to government servants ~~viz~~ vis-a-vis an industrial worker will suffice as other two non industrial workers viz domestic servants and agricultural workers have no safeguards of any kind, either at the point of their appointment or at their termination/dismissal stage. The Protection given to a government servant under Article 311, envisages that only the appointing authority or higher authority is empowered to remove, dismiss or reduce in rank a civil servant. An authority lower in rank to the appointing authority is prohibited to exercise such power.⁹⁸ However the Article does not require the same authority - Such power can be delegated but

97 Inter State Migrant Workmen (Regulation of employment and condition of services) Act, 1979.

98 See State of Assam V Kanaka Chandra AIR 1967 SC 884.

not to an officer subordinate in rank to appointing authority⁹⁹
 Protection afforded under Article 311(1) is only against
 Dismissal, Removal and Reduction in rank Power for orders other
 than those which result in the removal etc and other minor
 penalties can be conferred on an authority lower in rank than the
 appointing authority¹⁰⁰ Likewise, when a post is abolished,
 Article 311(2) has no application But if the abolition of post
 is mala fide to penalise the incumbent it would be violative of
 Article 311(2).¹⁰¹ Again in cases of constitutional appointments
 such as Judges of the Supreme Court, High Court, etc¹⁰²
 Articles 311(2) and 310(1) have no application Further,
 operation of 'Natural Justice' can be excluded by a statutory
 provision and constitution has also done this under the proviso
 of Article 311(2)¹⁰³

The Industrial worker gets the protection of industrial law
 and Article 14 by which fair, reasonable and just hearing before
 punishments, is assured Off late Article 21 and 300 A are also
 invoked in his favour where extreme case of livelihood is in
 question and certain payments and posts are treated to be of
proprietary right¹⁰⁴ and as such to be equitably distributed

99 See State of U.P. V Ram Naresh AIR 1970 SC 1263

100 Mohd Ghouse V State of Andhra Pradesh AIR 1957 SC 246

101 Panappa Gowda V State of Mysore (1968) 2 Mys LJ 479.

102 Appointments under Article 124, 218, 148, 317, 324 etc

103 See Union of India V Tulsiram Patel (1985) 3 SCC 398
 Satya Bir Singh V Union of India AIR 1986 SC 555
 Ikramuddin Ahmad Borah V Supdt of Police AIR 1988 SC
 2245

104 See District Manager AP SRTC V Labour Court AIR 1980
 AP 132 State of Maharashtra V Chandrabhan (1983) 2 SLR
 493 (SC)

Under Industrial Law, retrenchment is possible if proper procedure as prescribed has been duly followed.¹⁰⁵

Again every government servant is a public servant while vice versa is not true. Being a public servant, every government servant gets the protection of permission of prosecution by the appropriate government but such a protection is not available to an industrial worker.¹⁰⁶

Till recently, the private management was free to recruit anyone without observing the reservation quota of caste or backwardness of the worker though it was mandatory to observe in case of government recruitment or its allies. But now many concessions in tax, electricity rate, advance in loan and its repayment etc. are offered, if, the concern observes reservation policy of the Government in its recruitment. It is suggested, that globalization of industrial strides do not see eye to eye to reservation policy in recruitment - because multinationals want efficiency and efficient work not doling of jobs to raise standards of certain strata of Indian population.

105 See Industrial Dispute Act, 1947 Sec 25F, 25N, Bombay Union of Journalists V State of Bombay (1969) 1 LLJ 351 (SC)

106 See Section 21 of Indian Penal Code, 1862.

CHAPTER - III

THE FORMATION OF TERMS OF THE CONTRACT

A Terms and Conditions :

Implied terms and conditions usually become obligations when they reach the stage of implementation. There has been little attempt to define or delineate the expression 'terms and conditions', though it forms the part of every contract of employment.¹ According to Norman M Selwyn²

"The terms of the Employment are bilateral and they are part of the agreement made between the employer and employees whereas the conditions of employment are unilateral instructions which are laid down by the employer. The result is that a change in the terms^{1,2,3} can only be made by an express or implied agreement to that effect, whereas a condition can be changed by the employer unilaterally at any time.

Terms of Employment can be found in express and or implied agreement, collective agreements and various statutory provisions, conditions of employment are usually contained in works rules, disciplinary and grievance procedures and job descriptions. Wrong categorisation in between the two leads confusion and problems

It may be a term of a contract that an employee shall be entitled to four weeks holiday per year. The condition might be that he shall take these holidays at particular times of the year. A term will specify the number of hours he shall work; a condition will instruct him as to when he shall work these hours. A term will specify his employment duties, a condition will lay down how he shall perform those duties. The fact of payment is a term, the mode of payment is a condition. Terms stipulate, conditions provide a mode for their completion."^{2a}

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1. Cory-heighterate Ltd V Transport and General Workers Union (1973) 2 All ER 558
 2. Law of Employment 2nd Edn. London 1978 p. 39.
 - 2a. Ibid.

1) The Formation of the Terms of the Contract :

The concretisation of contractual obligations is normally traced from the formation of a contract. But in considering the formation of particular terms of the contract, it is important to avoid emphasis upon the initial formation of the contract. Many of the particular obligations with the contract may be established or re-established during the continuance of ~~the~~ the employment relationship. In that case, the establishment of the particular obligation has also to be regarded as a variation of the contract as a whole. The formation of terms of the contract of employment is a dynamic and cumulative process.

How this continuous process of establishing of obligations under contract of employment occurs, one must be cautious to differentiate the sources of contractual terms and the methods whereby those terms are established as part of the contract.

ii) Sources of the Terms -

- 1- Terms settled between employer and employee (which may include the adoption of a standard form of agreement such as a set of work rules)³
- 2- Collective agreements - in their normative rather than procedural aspect.⁴
- 3- Custom, practices⁵

3 For an important instance where works rules were said not to constitute contractual terms although the employees under took to comply with them, See, Secretary of State of Employment v ASI (No 2) (1972) LCR 19.

4 Kahn Freund, Sir Otto, Labour and the Law, London, 1972 p 46

5 Sagar v Ride High & Sons Ltd. (1931) 1 CH 310, W Brown : A consideration of custom and practice, (1972) 10 British Journal of Industrial Relations 42.

4 Terms presumptively implied under the rules of general laws and common law.⁶

5 Terms imposed by or under statutes

iii) The Methods of use of Sources of Terms -

The methods whereby these sources are used to establish contractual obligations are as follows -

- a) Strict agreement e g by the signing of a complete written agreement ,
- b) agreement by reference to other sources⁷ ,
- c) agreement by agency⁸ though the formation of terms of the contract of employment by agency will be relatively uncommon ,
- d) acceptance in practice as where working practice never expressly agreed upon, is accorded contractual force ;
- e) judicial rule making where a term is held to be implied by law ,
- f) application of statute law - where statutory provision take the form of implying a term into the contract ,
- g) issuing and acceptance of statutory particulars of terms of employment. This is compulsory statutorily in Great Britain.

In India, we would like to have such a provision

6 Lister V Ramford Ice & Cold Storage Co. Ltd (1957) AC 555
O'Brien V Associated Fire Alarms Ltd (1968) 1 WLR 1916

7. National Coal Board V Galley (1958) 1 WLR 16 provides an excellent example. .

8. Edwards V Skyways Ltd (1964) 1 WLR 349

The written particulars, though initially neither a source of contractual obligations nor a mode of establishing them, have become both of these things in the practice of industrial tribunals to ascertain contractual obligations. Thus the Industrial Tribunals and the Courts of Appeal have readily accepted the statutory particulars as embodying the terms of the contract as to create a situation in which the particulars are effectively acting as a source of contractual obligations.

In Gascol Conversions Ltd. v Mercer⁹ in which statutory particulars took the form of a written contract of employment which fixed a normal working week of 40 hours. It was held not variable by practice or by local agreement for a 54 hour week.

This is really an estoppel rather than a source of terms in the ordinary sense - but we may be justified in classifying it with other sources by reason of the way it operates in judicial practice.

B Maintenance of Employment Relationship vis-a-vis concept of cooperation in contract of Employment :

Because of the special nature of the contract of employment which we have noticed while analysing the structure of the employment contract, there are certain implied terms or presumptions or norms which must be complied with for successfully carrying out the obligations contained in the contract by both the parties of the contract.

One of the essentials of the employment contract has been to maintain the employment relationship. If this relationship

9 (1974) ICR 420

is disrupted, the shape of the contract will change and in consequence obligations of a different nature would emerge. Likewise, the maintenance of employment relationship involves the cooperation expected from both the parties to give success or to achieve the object of the contract. In Employment Contract the employer wants that his nominated or assigned task must be completed by the employee. The mere presence of the employee, if he does not perform any duty will not accomplish the task. The cooperation from employee is expected that he will not only be present but also perform his assigned task. The Employer's cooperation may be in the shape of giving instructions, raw material, specification of a particular task etc so that the object of the contract may be obtained. The mere presence of the employee and non cooperation of the employer i.e. not providing the employee his task as to what he is to do though will keep the contract alive i.e. the relationship of employer - employee will continue but not the object.

In this very connection, a pertinent question arises whether the employer is bound to give task or duty to the employee for continuing the contract of employment? Whether the concept of cooperation in employment contract requires provision of factual task to the employee or simply continuation of the relationship of employer - employee will suffice? Continuation of contractual relationship in the shape of employer and employee may be called the form or body of the contract and it must be allowed to continue for getting any results. But this shell will be empty, if no task is assigned or no duty is

performed Moreover, when the relationship of employer and employee is disrupted by any party to the contract without any legal base, the guilty party may be located and responsibility fixed for the damages for breach of the contract In this very context, the importance and role of implied terms and conditions of the contract of employment should also be properly evaluated The concept of cooperation in the context of contract of employment entails within its fold the different implied obligations to be carried out, by the employer as well as the employee so that the objects of the contract may be successfully achieved These very implied obligations to be borne by both the parties to the contract are implied terms and conditions of the contract of employment If the object of the contract of employment fails, does it mean that there was non-cooperation or non-fulfilment of implied obligations to be borne out by both the parties to the contract ? Failure of contractual goals leads one to think about the causes of the failure The causes may be many, but usually the non-cooperation and non-fulfilment of some of the implied obligations of the contract by one of the party or both the parties, comes out as a definite cause

In Emmens V Elderton,¹⁰ Elderton had entered into a contract with a life assurance company of which Emmens was the Secretary It was agreed upon that on yearly retainer payment, Elderton will act as attorney for the company when called upon to do so It was expected that Elderton would receive a substantial amount of work from the company for which he would charge item by item. As a result of disagreement, the company terminated the arrangement in

the middle of a year Elderton sued for damages for wrongful dismissal claiming a promise to retain and employ him. The Defence was that there was no contract to 'retain and employ' at all but only to pay the retainer, so that the claim was misconceived. This defence was rejected by a majority of eight to one.

In this case the structure of the contract of employment was analysed. It was recognised that the ordinary contract of employment involved a duty upon the employer to maintain the employment relationship and this duty was the basis of a right of action in damages for wrongful dismissal. This duty did not involve a duty to provide actual work. Thus in the present case it was held that there was no duty to provide the Attorney with specific items of work but there was nonetheless an obligation to employ him in the sense of maintaining him in employment. In contract of employment there are mutual obligations. By virtue of the mutual obligations of the parties to maintain the employment relationship, it is the obligation on the part of the employer which enables the employee to recover damages for wrongful dismissal. Because of this obligation, the plaintiff and respondent in this case succeeded. Whether failure to provide work is breach of Employment contract? The duty to maintain the employment relationship is quite distinct from that of providing actual work, which is more specific and exists only in certain circumstances. Now let us consider when failure to provide actual work may constitute a breach of the contract of employment. The cases in which it is recognised that the employee has an interest

in being given actual work to do are of several types as follows —

The cases in which the remuneration of the employee depends entirely on his being provided with work to do as where he is paid entirely by piece rate or by commission. In such cases the duty to provide actual work is necessary. To give practical work to the employee is the prior duty to maintain the employment relationship. Thus after the contrary view as had been taken, in cases in 1839¹¹ and 1843¹², the trend beginning with *R v Walch*¹³ established that the piece rated employee or the employees paid entirely by commission will normally be held to be entitled to the provision of such work as to enable them to earn remuneration at a reasonable level. That probably means the average level of remuneration which the employee had been receiving when work was being made available to him. There is authority to the effect that the same principle applies where the employee is remunerated partly by a fixed wage or retainer and partly on commission¹⁴. But there are certain decisions holding the contrary view where the remuneration is mixed in this way¹⁵.

11. *Res v Dixon* (1839) 9 Ad & E 693.

12. *Williamson v Taylor* (1843) 5 QB 175

13. (1853) 2 E & B 357 *Re Collier* (1854) 3 E & B 607 *Whittle vs Frankland* (1862) 2 B & S 49, *Thomas v Vivian* (1872) 37 JP 228 *Devonald v Rosser and Sons* (1906) 2 KB 728 — Employees paid entirely at piece rate. *Turner v Gold Smith* (1891) 1 QB 544 Employees paid entirely by commission.

14. *Re Rubel Bronze & Metal Co & Others* (1918) 1 KB 315 ; *Bauman v Hulton Press Ltd* (1952) 2 All ER 1121

15. *Ex Parte Maclare* (1870) LR 5 Ch App 737; *Raphael's claim* (1916) 2 Ch 309.

In the case of employment at piece rates subject to a guaranteed weekly minimum wage, it is unlikely that the employer would be held bound to provide piece work to enable the employee to earn anything above the expressly guaranteed minimum. Perhaps even in that case there might be such an obligation if the guaranteed minimum was very small¹⁶ in comparison with average piece-work earnings in the job concerned and if it, could be shown that the employer had work available but was withholding it from a particular employee¹⁶

Even in cases where the remuneration of the employee is not dependent upon his being provided with work to do, the failure to provide him with work, may be treated as breach of the employers contractual duty, because the employee is thereby deprived of publicity or of experience¹⁷

In Hall v British Essence Co Ltd¹⁸ it was held to be a breach of contract to suspend a director and general manager from his duties because of the injuries to his reputation which would result among the traders who had dealt with him

But there is a conflict of authority upon the question whether the actor or author who happens to be a victim of the

16 Bauman v Hulton Press Ltd. (1952) 2 All ER 1121

17 Marbe v George Edwards (Daly's Theatre) Ltd. (1928) 1 KB 269. Damages recovered (£ 3000) by an actress for loss of reputation in not being allowed to act; Herbert Clayton & Jack Waller Ltd v Oliver (1930) A.C. 209. £ 1000 damages recovered by an actor under the same head.

18. (1946) 62 TLR 542.

breach, is precluded from claiming damages for the loss of the existing reputation as opposed to loss of possibility of enhancement of reputation ¹⁹

In general, the cases where damages may be recovered for loss of publicity or experience are very much the exception rather than the rule. Such damages are refused in cases of wrongful dismissal under the ruling in Addis V Gramophone Co Ltd.²⁰ That rule was recently re-affirmed while being held inapplicable to the contract of apprenticeship²¹, but it does not necessarily follow that damages for deprivation of actual work during the continuance of employment need be limited in the same way.

The employers duty to maintain the employment relationship is seen not only as a bare duty to enable the employee to earn his remuneration but as a duty with a social dimension of ensuring the employee a function with the enterprise. The personnel management modes now-a-days attach much importance to the fact of the employees satisfaction with his job. Moreover, it has been established that the employers obligation was to provide work where available which amounts to holding that work must not be distributed in a manner discriminatory against a particular employee.

19 Marbe case *ibid* 17 suggests that loss of existing reputation may be included. *Withers V General Theatre Corporation* (1933) 2 KB 536 holds that it is excluded. The view which includes such damages may be thought to conflict with *Addis V Gramophone Co Ltd.* (1909) AC 488.

20 *ibid*

21 *Hedge V Ultra Electric Ltd* (1943) 1 KB 462.

On the concept of cooperation in contractual obligations, Mr Burrows, writing in 1968²² analysed the extent of requirements of contractual cooperation 'Cooperation' does not mean doing of a positive act which is not provided for in express terms but to render express part of the contract workable to do all that which makes it work even if not provided for This duty of cooperation is expected in absence of legal rules laying down broad moral principles with a tilt of preference on implied terms and imputed intentions of the parties in particular situations e.g. The employers obligation to make work available to the employee and the employees obligation to exert himself positively in his employers interests. But this general principle is governed by sub-rules about its applicability. Patterson recognised the need for such further rules and suggested that the answer lay in balancing in particular circumstances between the principles of cooperation and the counter-vailing principle that contractual rights should be restricted as far as possible to the express agreements of the parties.²³

As such, the overall obligation of a party to the contract of Employment will contain express as well as implied terms

C Obligations of the Parties under the Contract of Employment

It is the express conditions and terms which usually govern the specific obligations and this can be of any kind if both the parties agree for that But, because of the nature of the

22 (1968) 31 MLR 390-407.

23. (1942) 42 Columbia LR 903 at 937-42.

employment contract, each parties obligation portion contains in this type of contract, some implied duties also besides the express duties imposed by the contractual deed. The implied duties are adhered to, because of concept of cooperation to achieve the object of the contract.

Certain implied terms for the employee in the contract of Employment during its subsistence may be described as follows -

a(i) Implied duties of an Employee while the Contract Subsists
Personal Service :

The essence of an employment contract is the personal service by the employee. An employee cannot perform his duties through substitute unless so provided in the contract itself²⁴. The personal service means not only the presence of the employee at the worksite but also performing of the assigned task.

a
(ii) Personal service Through Substitutes :

So where by consent of the employer another employee is in fact substituted a new relationship is thereby established between the substituted employee and the employer, in other words a 'novation' has been created.²⁵ But the provision of a mere 'Lucum Tenen's'²⁶ as is common in India when a domestic servant is permitted a holiday, on condition that he will furnish an approved substitute in his place during his absence

24 Terry V Variety theatres etc Ltd (1928) 44 TLR 242

25 Nagpur Electric Light etc Ltd V Anand Vishnu AIR 1944 Nag 66

26 meaning holding the place.

does not, of itself, determine the original contract between the master and the servant, unless the original parties intended that effect. Such an arrangement being but temporary is outside the doctrine of 'novation'. The substitution in such a case does but suspend some part of the contract, the whole of which is revived on the return to duty of the original servant.

In industries the system of BADLI or substitute is customary in India, differing from industry to industry^{26a}. The basic element in Badli or substitute system is that the original contract of the employee (in whose vacancy a substitute is employed) with the employer is allowed to subsist during the absence of that original employee and working of the 'Substitute'.

a.
(iii) The Form of Badli or Substitute System :

It is usually of Two types —

First, where the worker takes the initiative and provides the substitute as his agent. This substitute will stand for all purposes in the shoes of the employee he represents and whose work he undertakes to do. The master will be answerable to third parties for any wrong done to them by the substituted employee and might have recourse to his permanent employee in respect of the neglect or misconduct of that substitute.

Second, where the Employer takes initiative, and employs a substitute with a fresh contract for the period, the

26a In Jute industry in West Bengal 3 Types of Badli workers are found viz —

1. Special Badli workers to be provided with 220 days work
2. Registered Badli workers to be provided with 180 days work
3. Casual Badli workers to be provided with 120 days work

original employee shall not be available but keeping the original contract intact and continuing, entrusting this substitute the job, the original was doing The payment by the employer in this case will be the payment under the new contract with the substitute, while in the first category as above, it will be to the agent of the original employee and how they both deal with it will not be the concern of the employer

^a
(iv) Enforceability of Personal Service :

The fact that equity would not directly or indirectly decree specific performance of a contract of personal service, seems to run counter to the principles of law as provided in Section 40 of the Indian Contract Act, 1872 The remedy is usually damages Indirectly, modern law induces for personal performance by making certain breaches punishable under particular statutes, especially in respect of public utility' concerns Further, a court of Equity would enforce by injunction a negative stipulation even if it be a term expressed or implied in a contract of service, in cases, when a claim for damages would be no appropriate or sufficient remedy ²⁷ In India, the Industrial Dispute Act, 1947 and the judicial law making, at present permit re-instatement of the employee where damages are found inadequate ²⁸

27 Such stipulations are spoken of as 'restraining Covenants' and equity would not enforce such a covenant where the restraint was found excessive or otherwise unreasonable so as to become 'restraint of Trade.'

28 Justice Krishna Aiyer in Gujarat Steel Tubes Ltd V Gujarat Steel Tubes Mazdoor Sabha 1980 (1) Lab. LJ 137, held every termination as retrenchment and if no procedure of retrenchment is followed then illegal, hence reinstatement

a.
(v) Analysis of certain situations in Context to personal service

a v

(a) Can an Employee have two or more Employers Simultaneously

There is no harm or illegality if a person serves more than one employer provided there is no clash of duties no deterioration in efficiency, and no concealment of this fact from either employer. An employee may be a general servant to one employer and a part timer to another, provided that the first employer has no objection. A master may let out the services of[†] a servant to another employer for a certain period. A workman on some particular occasion or during some particular period may have a general master and at the same time some special employer for whom he has agreed to perform certain services in aid of a contract between that special employer and his general master.

A government servant or a permanent wholetime worker cannot hold two whole time employments simultaneously drawing pay from two places for the same period. A whole timer may work as part timer with the permission of the parent employer without charging salary at the second place provided his efficiency and nature of work at the parent place, will not suffer. A person cannot hold two permanent posts simultaneously under the Indian Legal System.

a v
(b)

Position of an Employee in case the concern in which he works is transferred or sold :

In Nokes V Doncaster Amalgamated Collieries Ltd.²⁹ it was argued that in case of Transfer of the whole concern, the

Services of the workers were also simultaneously and automatically transferred to the new concern under whom the workers become servants without having himself either expressly or impliedly entered into any contract of service with it. The House of Lords disagreed with the opinion which had found favour with the court of Appeal, that a right to the service of any employee was the property of the transferor company. The House of Lords held that such an order under section 154 of the Companies Act, did not automatically transfer contracts of personal service which are in their nature incapable of being transferred, and that a contract of service did not therefore exist between the Appellant Nokes and the respondent company.

In cases of Transfer, sale, amalgamation etc the new entity usually enters into a fresh contract with the old employees of the old concern with their new terms and conditions and those who do not agree, are free to leave the new entity.

- a (2) Obedience : Obedience is the crux of an employee's implied as well as express obligations which he undertakes to fulfil in an employment contract. He is to obey those orders which the employer is justified in giving under the terms of the agreement all orders concerning the work which the employee is to do, and the time, manner and place of executing it are, in the absence of special circumstances, within the control of the employer. What orders an employer is entitled to give will ultimately depend upon the terms of the contract of employment or in default

on its character and the position of the parties whether an employee employed in a certain capacity may be asked to perform work not appertaining to that capacity e g whether a cook can be asked to perform the duties of a driver if the cook does not object and knows driving with a valid licence there will be no dispute but otherwise this cannot be legally a valid proposition These types of orders in industry where the workers are united and organised are taken care of by the worker's-union and in government service if the change amounts to a demotion in rank, it is not permissible without proper procedure

In Middleton V Playfair³⁰ it was observed that the relation of Master and Servant implied obedience, submission and respect on the part of the servant

The duty of obedience extends no further than to the lawful commands of the employer Orders which expose an employee to disease or to any danger to his person which he has not expressly or impliedly undertaken to run would not be in the category of lawful commands An employee may decline lawfully an order which he reasonably apprehends might involve injury to himself³¹

^a
(3) Duty of Disclosure Position, nature of duties and the terms of the agreement, usually specify the obligation of the employee to disclose the material information to his employer The interest of the employer is the guiding factor for disclosure

30 AIR 1925 Cal 87

31 Priestly V Fowler (1837) 7 LJ Ex 42 and The Ottoman Bank V Chakarian (1930) AC 277.

But an employee is not bound to disclose incriminating facts against himself. Likewise, if terms do not permit an employee is not bound to disclose the misdeeds of his fellow employees but if it is under his duties to disclose the misdeeds of his fellow employees, he must disclose them to the employer. Master In Swain v West³² it was held that the General Manager of a Company owed a duty by its terms of his written agreement to disclose the dishonesty of the managing director.

- ^a
(4) Faithful and Honest Service : It is the duty and obligation of the employee to discharge his duties faithfully and truly under the contract. Taking of bribe for carrying out his duties is not only wrong but amounts to a breach of his contract of employment. In many classes of services, the receipt of 'Tips' is fully recognised by the employers and wages is fixed taking full view of the quantum of 'tips' the employees will usually obtain. In Hotel industry, the 'tips' are allowed to be taken by the employees or may be pooled by the employer for equal distribution among other employees or no distribution at all, dependent^{int} upon the terms of the employment contract. In cases where 'Tips' or other collateral advantages are not allowed or contemplated, their acceptance is wrongful and it is no answer for the employee to say that he accepted the gift in the honest belief that he was entitled to it and that its acceptance did not cause him to act contrary to to his employer's interest.³³

32 1936 3 All ER 261. The Covenant ran "do all in his power to promote, extend and develop the interest of the Company."

33 Harrington v Victoria Growing Dock (1878) 3 RBD 549. Shipway v Broadwood (1899) 1 QB 369. Hovenden v Mellhoff (1900) 3 LT 41.

In Hivac Ltd V Park Royal Scientific Instruments Ltd ³⁴

it has been held that use of Sunday by the skilled workman in making a similar product for a competitor company is a breach of duty to his employer. Here, to make use of leisure for profit if not harmful to the employer will cause no trouble. But a workman cannot be allowed, knowingly deliberately and secretly setting himself to do in his spare time something which would inflict harm on his employer's business and industry.

Simply to familiarise with the customers to such an extent that customers follow the employee to another concern where the employee engages himself will give no cause of action by the master employer. ³⁵ But if it is against the written term of the contract and is done as a pre-planned device, the employer can restrain the employee. ³⁶

An employee must exercise reasonable care to safeguard his employer's property otherwise he will be responsible for its loss. Thus, where the supervisor of a team of salesmen selling vacuum cleaners left his car outside his house all night and the fourteen vacuum cleaners which were in the car, were stolen, the supervisor being in a responsible position had failed in his duty of care and was liable for the loss. ³⁷

34 (1946) Ch 169

35 Nichol V Martyn (1779) 2 Esp 732

36 Wessex Dairies V Smith (1935) 2 KB 80

37 Superlux V Plaistow (1958) C L Y 195.

- a (5) Careful Service : The employee should not commit negligence, fraud or other wrongful act causing damage to his employer's business or property. The mere fact that property entrusted to an employee is damaged or lost, does not make him liable provided care and skill on the part of the employee was not lacking. He is liable only if he has been guilty of negligence.³⁸

How far an employee can be held responsible whose incompetence as opposed to negligence causes damage to his employer's business or property, must depend upon the circumstances. The employee would be liable if he failed to possess and apply that skill which by entering into his engagement of service he contracted⁺ to possess and apply, unless, of course, the master knew of his servant's lack of skill, then the master would have only himself to blame.³⁹

The rule of careful service applies only to the duties which are part of an employee's normal employment. If in a labour trouble at a dock, the office staff is utilised for crane driving, the office staff will not be liable if any damage is done during such crane driving by them.

- a (6) Obligation to indemnify : The employee is required to indemnify the master employer for his wrongful acts for which the employer has been made liable under the principle of

38 Bacon's Abrogment, Master and Servant (cases where servant not liable) - Countess of Salop v Crompton (1600) Cro, Eliz 777

39 Hamer v Cornelius (1858) 5 CENS 236 Lister v Ramford ice and Cold Storage Co Ltd (1957) AC 555, Harrey v B G.O'Dell Ltd (1958) 1 All ER 657

implied authority unless it is shown either that the damage is too remote or that there is some other intervening factor which precludes recovery ⁴⁰

The employer will not be entitled to recovery if the employee was not doing an act for which he was engaged and employed ⁴¹ or if he was required to perform an unlawful act e.g. to drive a vehicle without a licence or a policy of insurance in force ⁴². The contributory negligence of the employer or the fellow employee will reduce the quantum of indemnity to an employer ⁴³

- (7) Liability to Account It is the obligation of the employee to account to his employer in respect of all monies or property recovered by him either from his employer or from any one else on latter's behalf Biddle v Bond ⁴⁴ is the authority for the well settled rule that an employee must account for and handover to his employer any profit or earnings directly or indirectly made in the course of or in connection with his employment

In Boston Deep Sea fishing & Ice Co v Ansell ⁴⁵ a Managing

40 Lister v Ramford Ice & Cold Storage & Co Ltd (1957) AC 555

41 Harrey v R G O'Dell Ltd Supra 39

42 Gregory v Ford (1951) 1 All ER 121

43 Jones v Manchester Corporation (1952) 1 All ER 121, See Glanville Williams : 'Vicarious Liability and the Master's indemnity' (1957) 20 MLR 220-228

44 (1865) 34 LJ, QB 137

45 39 CH D 339.

Director who received bonus on certain contracts with sister company was made to account for such bonus to the company of which he was a managing director. It was held that employer could recover this money, either as 'money had and received' or as an 'Equitable debt'. The employee is under an obligation to account for all sums received by him from third parties in the way of business payments or commissions or secret profits unless the right to receive them is conferred upon him by the contract of employment.⁴⁶

The recent "Re Reading"⁴⁷ exemplifies a situation where an employee has realised a secret profit, commission or bribe in the course of his employment, having a fiduciary relationship of a very wide import, may be sued for the amount by the employer. The doctrine of 'Equitable Debt', or 'Money had and received to his use' having changed its name to 'unjust enrichment' of modern time is applied in these cases and whether the employer had suffered any actual and factual loss is of no import.

The Obligation of an Ex Employee - when the operative portion of the Employment Contract is not subsisting :-

The relationship between employer and employee is one of trust, confidence and faith, it must follow that an ex-employee does not escape entirely from those obligations merely by leaving the employment. Though a distinction must be drawn between the duty of fidelity owed by an employee during the currency of the

46 East India Co V Henschman (1791) 1 Ves 287 Morrison V Thompson (1874) 9 QB 480.

47 (1949) 2 All ER 68 CA

contract of employment and the duty owed after the service bond has been terminated. In the former case the duty is contractual whether expressed or implied. This means that an employee cannot improperly disclose information or give any assistance to a competitor even if this is in his own freetime. The obligation of an ex-employee are more limited. He may be under a duty not to disclose information which has been imparted to him in confidence, and he may be restrained from working for a competitor by a validly worked restrictive covenant. Subject to these restrictions, an ex-employee is entitled to make use of his skill and knowledge which he has generally acquired in his previous employments.⁴⁸

- b (1) Disclosure of information : The ex-employee is under a duty not to disclose to any unauthorised person any confidential information he has obtained during his employment or to use such information in an unauthorised manner. In *Robb V Green*⁴⁹ an employee copied out a list of the employers customers with a view to approaching them after his employment had ceased and in *Wessex Dairies V Smith*⁵⁰ a milk roundsman during the last week of his employment approached his customers to ask them if they would join a round of his own which he was proposing to start. In both these cases it was held that there was a breach of contract.

Since it is not possible to erase out from an employee's mind information which he has gained in the course of employment

48 Selwyn M Norman : Law of Employment IInd Edn , London 1978, p 25

49 (1895) 2 QB 315

50 (1935) 2 KB 80.

and which he may properly place at the disposal of his new employer because of his memory in which consisted the know-how and general processes of the former employer's business and thus use his skills for the benefit of his new employer. Consequently in Printers and Finishers Ltd V Holloway⁵¹ an injunction relating to these matters was refused because it was not separable from his general knowledge of the whole trade and it would not be unreasonable for him to recall particular features of his former employer's business.

If the information obtained, though confidential, relates to a breach of the law or other wrongful act by the employer, then there is no confidence as to the disclosure of an inequity. In Initial Services V Putterill⁵² the defendant was an ex-employee who gave information to a newspaper disclosing the violation of Restrictive Trade Practices Act 1956 and issuance of circulars which were misleading to the public. The plaintiff sought an injunction against the publication. It was held that the disclosures would be justified as being in the public interest and there was no confidence attached thereto.

- b (2) Covenants in Restraint of Trade It is always advisable for an employer who wishes to have protection against the disclosure of confidential information, to have a covenant signed by the employee to this effect. Though there are several limitations on the right of the employer to impose such restraints, the employer cannot take away the employee's skill, experience and fund of

51 (1964) 3 All ER 731

52 (1968) 1 QB 396

knowledge which he has obtained during the employment and in particular the employer cannot protect himself against future competition per-se In Strange V Mann⁵³, where the defendant agreed not to engage in similar business within a radius of 12 miles - but actually setup the like business within the ~~peris~~ prohibited area It was held that the restriction was void The purpose of the covenant was not to give legitimate protection to the business interests of the employer but was a naked attempt to prevent future competition

The interests in respect of which the employer is entitled to have protection, are basically two - 1) Trade Secrets
2) His customers and connections

- (3) Trade Secrets The good faith is a very important factor in practical business activities If an employer could not ensure that his employees would not pass on information concerning his secret processes, it might restrict the employment relationship to an extent where commercial initiative becomes impossible The employer would not be able to trust the employee furtive attempts would have to be made to disclose some information without disclosing all, industrial espionage would flourish and employees would attempt to sell secrets to higher bidders Research and Development would be hampered and become unprofitable This was, atleast the outlook of former economic theories, though a sea-change has come in the modern era because of statutory provisions of Patent Law but the legal principles remain

substantially the same. Thus if a trade secret or a secret process exists, the employer is entitled to have his employees promise not divulge that information to a future employer at least subject to possible reasonable limitations on 'Time' and 'area'. The protection taken out by the employer must be in respect of his specific interest, properties, business or goodwill. If it is too wide for these purposes it will be void.⁵⁴ A more liberal approach to this question was taken by the Court of Appeal in the recent case of Littlewoods organization Ltd v Harris⁵⁵ where the plaintiff ran a mail order business, their chief rivals being Great Universal Stores (GUS). The Defendant worked for the plaintiff in a senior position, and had access to confidential information about how the business was operated. He agreed that on leaving his employment he would not work for GUS for a period of twelve months. He then resigned his position in order to take employment with GUS and the plaintiffs sought an injunction to restrain him. It was argued from the defendant's side that covenant is too wide covering the whole world where GUS operated. But Court held it applicable to the mail order business of GUS and a such reasonable

Objective and Subjective knowledge : It is not possible to restrain an employee from disclosing to a future employer a special method of ~~an~~ organisation as opposed to a secret process for one must draw a distinction between objective knowledge such as trade secrets and list of customers which are part of the employer's property and the subjective knowledge which has been acquired by the employer such

54 Commercial Plastic Ltd v Vincent (1965) 1 QB 623

55 (1978) 1 All ER 1026

as his general knowledge of the trade or industry or his organisational ability In Herbert Morris Ltd v Saxelby⁵⁶ an engineer covenanted not to be engaged by a competitor for seven years after leaving his employment This was held to be void for it was a restraint on his technical skill and knowledge which he had acquired by his own industry observation and intelligence and this cannot be taken away from him

- b. (4) Existing Customers and Connections The employee may develop a very cordial relationship with the customers of the business where he is working so much so that customers are ready to follow him if he takes a new employment Here the employer may seek protection⁵⁷ In this case Defendant was employed as a Sales Representative He covenanted not to canvass or solicit orders from any person who was a customer of the firm for a period of two years after leaving his current employment It was held that the restraint was valid even though it extended to customers whom the employee did not know or with whom he had no contact during his period of employment It was argued that the restraint was bad because it could apply to those customers who had ceased to do business with the firm, but the court of Appeal thought that an employer was entitled not to abandon hope that such customers would return to do business once more

If a firm is engaged mainly in trading in a localised area and has few customers outside that area, a covenant restraining an employee from working in that type of business anywhere in the world

56 (1916) 1 AC 688

57 Flowman v Ash (1964) 2 All ER 10 CA

must of necessity be void as being wider than required for the protection of the employer's business ⁵⁸ Again if the business is such that it is not of a recurring nature, then the employer's interest in the customer ceases on the conclusion of a particular transaction and he is not entitled to protection against poaching ⁵⁹ The factual position held by the employee is also a very relevant factor A low wages employee having no access to confidential matters cannot be a potential competitor ⁶⁰ Neither an employer is entitled to restrain competition by preventing an ex-employee from approaching persons who are not his customers In Gledlow Auto Parts v Delaney ⁶¹, the plaintiffs employed the defendants as a commercial traveller It was agreed that after leaving his employment, the defendant would not seek orders from any firm within the area in which he had previously operated The restraint was held to be void, for as worded it would have prevented him from calling on firms who were not then customers of the plaintiffs and was therefore a covenant designed to restrain competition

- b (5) Extent of the Restraint : Restraints should protect the legitimate interests of the employer but within their proper limit and if they cross the limits they will become void So the covenants should not be too wide in terms of Time or Too extensive in terms of area covered, otherwise courts will not enforce them Covenants which are in restraint of trade will only be valid if they are reasonable and this will depend upon the examination of all circumstances of a given case

⁵⁸ Dowden & Pook Ltd v Pook (1904) 1 KB 45 CA

⁵⁹ Bowler v Lovegrove (1921) 1 CH 642

⁶⁰ M and S Drapers v Reynolds (1956) 3 All ER 814 CA

⁶¹ (1965) 3 All ER 280 CA

In Nordenfelt V Maxim Nordenfelt Guns and Ammunition Co Ltd ⁶²
 an inventor of guns and ammunition sold his business to a company
 for a substantial sum and covenanted not to be engaged in any
 similar business anywhere in the world for twenty five years
 Considering the world wide nature of the business and the price
 which had been paid for his promise the House of Lords held that
 the restraint was reasonable Time and area may be looked at
 together to assess the validity of the covenant ⁶³ and the
 restriction cannot be worded in a manner which prevents the employee
 from obtaining non-competing employment (Commercial Plastics Ltd V
Vincent) ⁶⁴

- b (6) The rule of Severance : The covenant if too restrictive it
 would be totally void The court will not validate the agreement
 by altering it because the test is whether the parties have in fact
 made a valid agreement, not whether they could do so and it must
 stand or fall on its own merits But the court can sever or
 separate, a too wide term from a valid and reasonable term and the
 former may struck out of the agreement altogether and the latter
 may be enforced ⁶⁵ In a case where the defendant has worked as
 Sales Representative with the plaintiff and had agreed that after
 leaving the employment he would not (a) deal with in any goods
 similar to those which he had previously sold, (b) solicit orders

62 (1894) AC 535 Desh Pandey V Arvind Mills Co Ltd AIR 1946
 Bom 423 Brahma Putra Tea Co Ltd V Scarth (1885) 1 LR II Cal
 545 Charles worth V MacDonnel (1898) -23 Bom 103, Home V
 Douglas (1912) 17 CWN 212 P C

63 Fitch V Dewes (1921) 2 AC 158

64 Supra Note 8

65 Lucas V Mitchell (1974) CH 129

from or supply any such goods to any customer of the firm within the Manchester Area. The first part of the covenant is clearly void because it was a restraint on competition. The second part was clearly reasonable because there were two separate restraints capable of being enforced separately. The excision of the first was possible without affecting the second. 65a

- b (7) Can Employers make Restraints among themselves ? Employers cannot agree to a restraint among themselves and this would not be enforced if it is made a covenant while entering agreement with the employees. In other words the contents of Employers restrictive covenant amongst themselves cannot be enforced if made an item of agreement with the employees. In Kores Manufacturing Co V Kolok Manufacturing Co 66 two companies both engaged in the selling of carbon papers, agreed that they would not employ any person who had been employed by the other party for a period of two years after that person had left the others employment. Had the restraint been imposed by a company on the employees it would have been void. It was equally void having been made by the employers themselves. Restrictive covenants are available only when the employee leaves validly. If an employer wrongfully dismisses an employee he cannot claim the benefit of the restrictive covenant because the whole contract has been repudiated by the employer - (General Bill Posting Co V Atkinson) 67

65a Ibid

66 (1959) CH 108

67 (1909) AC 118 Madras Railway Co V Rust (1890) 14 Mad 18
 Subha Naicu & Others V Haji Badsha Sahib & Others (1902)
 26 Mad 168

b (8) Indian Position In India, right from Madhub Chander Das V Raj Coomar Das⁶⁸ the view has been that section 27 of the Indian Contract Act, 1872 provides the whole law on restrictive covenants exhaustively In Niranjan Shanker Golkari V Century Spinning and Manufacture Co⁶⁹ the Supreme Court held that the Restrictive covenants during the subsistence of the service contract do not hit section 27 of Indian Contract Act 1872 The court drew a distinction between a negative covenant during the currency of the employment contracts and a covenant meant to operate after the termination of the contract of employment The latter will be valid only if covered by the exception as provided in section 27 of the contract Act, 1872. The inferences of foreign judicial findings and case law has no place in face of the clear statutory provisions

In Satyabrata Ghosh V Mugnee Ram Bangur⁷⁰ the Supreme Court had held in context to section 56 of the contract Act 1872 that it was not to be influenced by English Law What is true for section 56 is true for section 27 also⁷¹

The latest case on negative covenant in India is ~~supra~~ Superintendence Co India (P) Ltd V Krishan Murgai⁷² where it was stipulated that after leaving the service the defendant servant will not carry on the similar business at the place of his last

68 (1874) 14 Beng LR 76 Brahmaouta Tea Co V Scarth (1885) 1LR 11 Cal 545

69 AIR 1967 SC 1098

70 AIR 1954 SC 44

71 Superintendence Co of India (P) Ltd V Krishan Murgai AIR 1980 SC 1717

72 AIR 1980 SC 177 & See Supra No 25 also

posting for two years. The servants services were terminated and he began to carry on the similar business at the place of his last posting after termination without waiting for two years as stipulated. The Appellant filed a suit for restraint and damages. The Supreme Court dwelt heavily on the word 'leave' and it was found that the termination does not include (after leaving the service) as stipulated, hence the servant was found not guilty and covenants were adjudged as hitting section 27 of the contract Act 1872 and hence void.⁷³ The employee in this case was also allowed to establish a similar business within the area of his last posting and that too just after he was terminated.

- In India certain restrictions are placed in the conduct rules of Government Employees that after retirement they shall not —
- 1) Divulge any confidential information which they dealt with during their active employment as such and after retirement upto 3 years. The memoirs of Senior Police Officers, Military Officers, Detectives, Judges etc cannot be published within 3 years of their retirement.
 - 2) Engage themselves with any contractor, firm or Business House with which they have conducted government business, orders, contracts, supply of materials, goods etc for a stipulated period of time after retirement.
 - 3) Judges after retirement cannot practise in the same court in which they worked as a Judge. The Law Commission has recommended that a judge after retirement should not be engaged by the government to man any enquiry commission etc so that independence of judiciary may not be tilted.

⁷³ Vishan Murgal / Superintendence Co of India (P) Ltd AIR 1979 Delhi 232 was affirmed

These restrictions are to have a fair play and curb
 curruptions, nepotism etc while a person holds a position
 of authority and power during the period he holds such
 authority as well as after the retirement

In non Governmental Sector the restrictions are placed
 through covenants usually through a 'Standard Form' or
 'Adhesive Contract', the justiciability of which will be with
 in the contours of section 27 of the Indian Contract Act 1872
 as already pointed out earlier by the Supreme Court

C Implied Terms of Contract of Employment against the Employer

The terms are treated as duties of the employer and may be
 enumerated as follows —

- c (1) Duty to pay - Though wages are not essential to contract
 of Employment,⁷⁴ nor are wages or any remuneration due because
 services have been rendered which are usually performed under
 a contract of Employment in return for a wages or
 remuneration⁷⁵ To arrive at the correct solution, one must
 analyse the facts of each case and apply the following
 principles

74 It may be in the shape of Boarding & Lodging, clothing or
 g. ~~gratuitous~~ ~~gratuitous~~ In Reeve V Reeve (1858) 1 F & F at p 280,
 'an action' cannot be maintained for remuneration merely
 because it may appear to be reasonable, and so a man cannot
 claim to be another's servant against the latter's will and
 in respect thereof claim wages or remuneration Long service
 in itself confers no right to wages

75 Davies V Davies (1839) 1 C & P 87 Coward V Motor Insurer's
 Bureau (1963) 1 QB 259, British Guiana Credit Corporation V
 De-Silva (1965) 1 WLR 248.

i) For a binding and valid contract of employment, there must be an element of consideration. If consideration is lacking the parties shall have no obligation on their part and court will not come to their aid. Adequacy of consideration or wages will be of no avail for repudiating the contract and hence once entered into the other party cannot refuse to be bound because the wages or other remuneration⁷⁶ are small and inadequate or merely contingent.

ii) In English Law, the factum of services rendered which benefits another does not in itself cast a liability on the latter to remunerate the person rendering them. However, valuable those services might have been because there is no principle of salvage in Common Law though there is one in Admiralty law. In India, if the intention of the servant had not been gratuitous, or the services are in the nature of necessities supplied to a minor or lunatic, the doctrine of 'unjust enrichment' is applied under the concept of quasi-contracts and the other party is reasonably compensated either from the person or in the latter cases from their properties. The law presumes a promise to pay for those services or benefits which are voluntarily accepted

where the person accepts the benefits of another's service which is normally remunerated and there is nothing to show that this was an exceptional case where no remuneration was to be given. The law will presume an obligation to pay a reasonable⁷⁷

76 Gaumont - British V Alexander (1936) 2 All ER 1686

77 Poucher V Norman (1825) 3 B & C 744 Ford V Morley (1859) 1 F & F 496 Higgins V Hopkins (1848) 3 Ex 166

If the person does not wish to pay for them he should not accept them hence, if the services are rendered without his knowledge or without his opportunity to accept or refuse them no promise to pay can be implied.⁷⁸ where the servant has agreed to absolutely leave the whole question of wages or remuneration to the employer the servant cannot claim any wages⁷⁹ but where merely the rate of wages is left to the employer and the employer refuses to fix any rate, a reasonable wage is recoverable⁸⁰ In Minnevitich V Cafe 'de Paris'⁸¹ a clause in a musician agreement 'No Play No Pay' has been construed as not giving the master an arbitrary right to stop 'Play' If a master without any proper excuse refuses to allow a performance then he must pay

When there is work and the worker has performed it it creates no dispute But is there an implied duty to pay wages or other remuneration when there is no work ? The general rule is that an employer must pay the wages of all employees if they are available for work but none is provided work by the employer⁸² But if the failure to provide work was due to circumstances beyond the control of the employer - employer was not obliged to pay e g in Browning V Crumlin Valley Collieries⁸³ a colliery had to be

78 Wheeler V Stratton (1911) 105 LT 786 Sumptor V Hedges (1898) 1 QB 673

79 Taylor V Brewer (1831) 1 M & S 290 Ex P Metcalfe (1856), 6 E & B 287 Kofisunker Sette Obu V A Strauss & Co Ltd (1951) AC 243

80 Peacock V Peacock (1809) 2 Camp 65 Moffat V Laurie (1855) 15 CB 503

81 (1936) 52 WLR 413

82. Devonald V Rosser & Sons (1906) 2 KB 728

83 (1926) 1 KB 522

closed down because it was in a dangerous condition through no fault of the employers

The rule to pay when no work is provided by the employer can be varied by an express or implied term to the contrary. Thus if contract provides that there shall be no payment during layoff or in respect of short time working, the employer will not be obliged to pay. But if a statute provides a procedure and payment during the lay off period as in India the parties cannot contract out the provisions of a statute ⁸⁴

c (2) Duty of Mutual respect or implied duty of the employer to pay respect to the employee :

The modern age requires the management to treat his employee with due respect and consideration mindful of their needs and problems. It is no longer possible to treat an employee as an expendable chattel or as an object without feelings and emotions. The employer is not allowed to carry on provocative conduct. In *Donovan V Invicta Airways Ltd* ⁸⁵ the employee resigned after what he considered in a number of incidents, the employer being unfair, and claimed damages for breach of contract. It was held that such conduct, though irritating, was not substantial enough to amount to a breach - but it was stated that there was an implied duty that each of the parties to a contract of employment should treat the other with such a degree of consideration and courtesy as

84 Industrial Dispute Act, 1947 (Sec 25-C) A permanent worker who has completed at least one years continuous service and whose name is borne on the muster roll may be paid compensation for forty five days in a calander year for 'laying Off'

85 (1969) 2 Lloyd's Rep 413

would enable the contract to be carried on In Cox V Phillips Industries Ltd⁸⁶ the plaintiff was promoted to the post of product leader- then moved to a lesser position without any precise duty and as a result became depressed anxious frustrated and ill He accepted a redundancy payment and sued for breach of contract and wrongful dismissal He succeeded in getting damages This duty of treating each other with mutual respect starts from the beginning of the Contract of Employment and lasts till the contract is terminated

- 2, (3) Duty to provide work For an employer it is no breach of contract in refusing to give his employee anywork to do so long as he pays the agreed wages⁸⁷ Applying Emmens V Elderton⁸⁸, the use of the word 'employ' does not involve an obligation upon the employer to find employment or work but merely to keep the employee in his employ in the sense of paying him his wages But in Bauman V Hulton Press Ltd⁸⁹ for retaining fee and payment at special rates the journalist agreed to offer all his work to defendant first and not to accept any commission from any other British weekly and to be available to undertake commissional work from defendants at all times It was held that it implied a term to give the contract business efficiency that defendants would give plaintiff sufficient work to enable him to earn what they must be taken to have contemplated he should earn where the employer guarantees a certain amount of work he commits a breach of contract

86 (1975) 119 SJ 760

87 Turner V Sawdon (1901) 2 KB 653

88 (1853) 13 CB 495

89 (1952) 2 All ER 1121

if he fails to provide it In the case of apprenticeship there is a definite duty cast on the master to teach ⁹⁰

As a general rule, the employer is not under an obligation to provide work to his employees As observed in Collier V Sunday Referee Publishing Co ⁹¹

" Provided I pay my cook her wages regularly,
she cannot complain if I choose to take any
or all of my meals out "

Though in certain cases employer may find himself unable to provide work for his employees e g depression in market strike, lack of orders shortage of raw materials, natural calamity etc yet the employer prefers to keep his work-force together and as such pay them for doing nothing There are certain circumstances where the failure to provide work to the employee may result in the breach of contractual obligation -

- 1) where the failure to provide work leads to loss of reputation and/or publicity - the element of payment will not be sufficient In Herbert Clayton and Jack Waller Ltd V Oliver ⁹² an actor was given a leading role in a musical comedy He was subsequently offered a lesser role but at the same payment, it was held that the employer was in breach of contract because the nature of the work and element of publicity were as important as the salary to be paid to the Actor Here the employee is deprived of publicity and experience

90 R.V Combe (1828) 8 B & C 82

91 (1 40) 4 All ER 234

92 (1930) AC 209 Marbe V George Edwards (Daly's Theatre) Ltd
(1928) 1 KB 269

- 2) If the failure to provide work leads to a reduction in the employees actual or potential earnings - it may be treated as a breach. Thus an employee is entitled to be given an opportunity to earn his commission⁹³ or to earn a reasonable sum if he is on piece work basis⁹⁴. It was the lack of opportunity to earn premium payments for hours worked on night shift and overtime which constituted the breach of contract by the employers⁹⁵.
- 3) There is a dicta in Langston case which suggests that if an employee needs practice in order to maintain or develop his skills in employment the employer is under a duty to provide a reasonable amount of work for this purpose.
- 4) Recent decisions seem to lean to the view that a failure to provide work may constitute a repudiation of the contract by the employer if it is possible to imply a term into the contract that employer shall provide suitable work. This appears to be particularly true when the employee is appointed to a specific office. In Breach v Epsylon ~~V Epsylon~~ V Epsylon Industries Ltd⁹⁶ it was thought that some of the earlier decisions on the subject were somewhat out of date and old fashioned in their approach. Consequently in modern cases there may be facts which more readily lead to the conclusion that there is an implied term to

93 Turner v Gold Smith (1891) 1 QB 544, Geotrollope v Martyn (1934) 2 KB 436 & Geotrollope v Caplan (1936) 2 KB 382

94 Devonald v Rosser & Sons (1906) 2 KB 728

95 Langston v Chrysler United Kingdom (1974) 1 All ER 980 CA

96 (1976) ICR 316

the effect that there is an obligation to provide
work ⁹⁷

- c (4) Duty to Indemnify : This is the general principal of law that an indemnity is owed whenever one person at the request of another does an act involving him in liability therefor ⁹⁸ where an employee incurs liability or loss or damage or is put to expense on his masters behalf, he is entitled to an indemnity from his employer to cover these obligations or losses This view was supported in Shaffield Corporation V Barday ⁹⁹ More difficult is the situation which arises when the employee commits a wrongful act If this was done for the employers business and was authorised or if the employee was acting under his employers orders then the employee is entitled to be indemnified for any personal loss he suffers For example, if an employer requires an employee to take out the firms van which has a defective tyre and the employee is consequently fined then it is reasonable to expect the employer to reimburse the amount even though he may be prosecuted in addition But if the work can be done in a lawful or illegal manner and the employee chooses the latter option, the employer would not be required to reimburse such expenditure, e g if the employee in order to deliver some goods parks the van illegally then unless he was told to perform his work in this manner, he must bear any subsequent fine himself ¹⁰⁰

97 Selwyn i Norman Law of Employment Second Edn London, 1978, p 121

98 Dugdale V Lovering (1875) 10 CP 196

99 (1905) AC 397

100, Supra Note ⁹⁷ at P 123

In Gregory V Ford¹⁰¹, the plaintiff was injured due to the negligent driving of the defendant's van whose employer did not have a valid third party insurance policy as required. It was held that there was an implied term of the contract that the employer would not require the employee to do an unlawful act, and therefore, the employer should indemnify the employee in respect of damages which were awarded to the plaintiff. In Re-Famation Development Corporation Ltd¹⁰², a consulting Engineer employed by the Co was asked to prepare a report on the conduct of the Managing Director. The latter brought an action for an alleged libel which the Engineer defended. It was held that he was entitled to be indemnified by the Company for his costs in defending the action, for he had been requested by his directors to make the report, which was therefore in the course of his duties as an employee.

Limitation of Indemnity Principle ?

- 1) As between Employer and employee the indemnity arises in favour of the employee when he acts within the actual scope of his authority. Thus where the employee is guilty of personal act of negligence in carrying out his duties such as negligent driving the employer is under no obligation to indemnify the employee because in such a case the employee's loss is not due to his carrying out his employer's order or to the duties of his service but is attributable to his own wrongful act.¹⁰³

101 (1951) 1 All ER 121.

102 (1914) 2 CR 271

103. Lister V Romford Ice & Cold Storage Co Ltd (1957) AC 555.

- (2) No indemnity can be sought by one joint wrong doer against his fellow wrong doer¹⁰⁴ This is subject to the rule in *Adamson v Jarvis*¹⁰⁵ and so where the employee is not aware that his acts are wrongful he may, inspite of their tortious character, claim an indemnity¹⁰⁶ and this indemnity will exist although the act was criminal, if the employee believed that in obeying his employer's orders he was doing nothing either illegal or immoral¹⁰⁷

The servants rights to an indemnity depends on all the circumstances, such as the extent of his authority the nature of the wrongful act and the knowledge or ignorance of him or his master¹⁰⁸

- c (5) Duty of Employer for references : An employer is under no legal duty to provide an employee or an ex-employee with a reference Further, a derogatory reference may lead to an action for defamation though this may be defended on the grounds that the statement made was true or if untrue, it was made without malice in the sense of an improper notice or it was made on an accasion when the law confers qualified privilege. On the other hand to give a commendatory reference, which is untrue and which is

104 AS distinguished from contribution see *Jones v Manchester Corporation* (1952) 1 All ER 121

105 (1827) 4 Bing 66 *Ryan v Fildes* (1938) 3 All ER 517

106 *Dixon v Fancus* (1861) 30 LJ QB 137, *Gregory v Ford* (1951) 1 All ER 121

107 *Burrow v Rhodes* (1899) 1 QB 816

108 Batt F.R. *The Law of Master and Servant* 5th Edn London 1967, p 229.

relied upon by a subsequent employer to his detriment, may well lead to an action based on deceit or negligent misrepresentation, unless the statement is qualified by a disclaimer of responsibility

The problem may arise in dismissal cases. In Castledine v Rothwell Engineering Ltd,¹⁰⁹ one of the reasons given by the employer for dismissing the firm's buyer was that he was incapable of performing his job adequately. But the employer had also given a reference to the employee "had carried out his duties satisfactorily often under difficult conditions" and the tribunal found that the employee had been unfairly dismissed. In Haspell v Rostron & Johnson Ltd¹¹⁰ the employer gave a laudatory reference to the employee. It was held that they were estopped from relying on criticism of her performance as a reason for her dismissal.

In Indian Context, the bad as well as good entries into the character roll are allowed to carry their force for a specified period only, say 1 year or 3 years as the case may be, so that a bad man may become good or a good man may also change his colour to a better one. The concept of Natural Justice is applied in considering the punishment or promotion of the employee. Moreover, a bad entry is, as a rule, always communicated to the employee concerned.

- (6) Duty to Ensure Employee's Safety The law implies to take reasonable care by an employer to ensure the safety of his

109 (1973) 1 All ER 216

110 (1976) 2 All ER 290

employees This is ensured through many rules of general law and statutory provisions If the rules are broken or not observed by the employer, it may lead to an action for damages by an injured employee based on breach of statutory duties or general law duties the action may run together but damages will be awarded only on one count By Safety, we imply three duties -

- i) to provide a reasonable safe place for the employees to work in, provided the employer is occupier of the premises ¹¹¹
- ii) to provide what is called a "safe system of working" or sound system of working" ¹¹²
- iii) competent staff of fellow employees

These obligations are in theory separate but in practice, are often seen to overlap Davidson V Handely Page Ltd ¹¹³ illustrates the quantum of employers implied duty In this case an employee while washing up a tea cup for her own use during the working hours slipped upon a somewhat slimy duck-board below the sink she was using She was allowed to recover damages The Court held that what had taken place, was something in the course of her employment This principle was enunciated as sound in Willsons and Clyde Coal Co Ltd v English ¹¹⁴ in which Lord Wright observed -

111 Taylor V Sims & Sims (1942) 2 All ER 375 It is the owner or the occupier of the premises who will be liable to the employee

112 Clifford V Charles H Challen & Sons Ltd (1951) 1 All ER 22 Plaintiff got the skin disease of 'dermatitis' - no provision for protection cream or clean water in the factory It was held that though there was no breach of Factory Act, but a breach of Common Law duty to provide a 'Safe system of working', has occurred

113 (1945) 1 All ER 235

114 (1938) AC 57

" The whole course of authority consistently recognises a duty which rests on the employer to take reasonable care for the safety of his workmen. The obligation is threefold. The provision of a competent staff of men, adequate material and a proper system including effective supervision "

Where the employer knows the dangerous nature of the job he must take proper precaution for the safety of the employees where the work is not intrinsically dangerous but is rendered dangerous by some defect of appliances etc it is the duty of the employer to supply safe and sound appliances for carrying out the job ¹¹⁵ In Bond V Wilson & Sons ¹¹⁶ it was held that —

" The master does not warrant the safety of his servant, he is only bound to take reasonable care and precaution to protect the servant against accidents "

c (7) Effect of New Technology : Is the employer bound to adopt all the latest improvements and new appliances for safety ? In Toronto Power Co Ltd V Paskwan, ¹¹⁷ it was held that a master is not bound at once to adopt all the latest improvements and new appliances. It is a question of fact in each case whether in the circumstances it was a want of reasonable care not to have adopted them

c (8) Unilateral Enhancement of risk of the Employee : The employer cannot increase or enhance the nature of risk undertaken by the employee unilaterally. In Middleton V Playfair ¹¹⁸ it was held

115 M/s J D. & Co Mills V ESI Corporation AIR 1963 AP 210

116 (1908) 24 TLR 238

117 (1915) AC 734

118 AIR 1925 Cal 87.

" It is one of the implied stipulations of a contract of employment that the employer will not by any act of omission or commission, add or suffer to be added to the employment new conditions involving obligations, dangers or inconveniences which were not incidental to it and were not within the contemplation of the employee when he was engaged "

C (9) Standard of Care The Standard of care which an employer must observe is, as Lord Oaksey pointed out in Pans V Stepney Borough Council,¹¹⁹

" The care which an ordinary prudent employer would take in all the circumstances."

The employer does not guarantee that an employee will not be injured, he only undertakes to take reasonable care and he will only be liable if there is some lack of care on his part in failing to prevent something which was reasonably foreseeable. The employee on his part must be prepared to look after himself and not expect to be able to blame the employer for every incident which takes place.

In Vinnyey V Star Paper Mills¹²⁰ the plaintiff was instructed by the Foreman to clear and clean a floor area which had been made slippery by a viscous fluid. The Foreman provided proper equipment and gave clear instructions. The plaintiff was injured when he slipped on the floor and it was held that the employer was not liable, for there was no reasonably foreseeable risk in the performance of such a simple task. So too, in Lazasus V Firestone Tyre and Rubber Co Ltd.¹²¹ where the

119 (1951) AC 376

120 (1965) 1, All ER 175

121 The Times May 2, 1963 quoted in Principles of Labour Law by Roger W Rideout 345

where the plaintiff was knocked down in the general rush to get to canteen. The court held that this was not the sort of behaviour which grown persons could be protected against.

If the employer does not know of the danger and could not be expected to know in the light of current knowledge or did not foresee the danger and could not be expected to foresee it, he will not be liable.¹²² The criteria was laid down by Swanwick J in Stokes v GKN¹²³ as follows

- 1) The Employer must take positive steps to ensure the safety of his Employees in the light of the knowledge which he has or ought to have.
 - 2) The employer is entitled to follow current recognised practice, unless in the light of common sense or new knowledge this is clearly unsound.
 - 3) Where there is developing knowledge, he must keep reasonably abreast with it and not be too slow in applying it.
 - 4) If he has greater than average knowledge of the risk, he must take more than average precaution.
 - 5) He must weigh up the risk (in terms of the likelihood of injury and possible consequences) against the effectiveness of the precautions needed to meet the risk, cost and inconvenience.
- Further more

- a) Duty of providing 'Safety' is personal. The employer after appointing a safety officer cannot absolve himself from the ~~the~~ liability.^{123a} Equally,

122 Trustees, Port Bombay V Yamuna Bai AIR 1952 Bom 352
R.B. Moondra & Co V Mst Bhanwari AIR 1970 Raj 111

123 (1968) 1 All ER 210

123a Supra Note ~~123~~ 114

- b) The duty is owed to each employee as an individual not to them all collectively ;
- c) A higher standard of care must be shown to employees who are illiterate or are lacking sufficient command or adequate command of the English Language (where the instructions are in English) and —
- d) To ensure that they are properly trained and clearly instructed so as not to cause injuries to themselves and to others ^{123b}

The standard and nature of care needs further elaboration on the following headings —

- c (10) Safe Plant and Appliances : This means that all the equipments, tools, machinery plants etc where the employee works shall be reasonably safe for work. The recent Carbide Gas Leak in Bhopal in 1984 and Chloride Gas Leak from the storage tank of the chemical and plastic divisions of the Calico Mills at Chembur on August 30, 1985, is the example of unsafe plants. Because of unheated van if a driver was required to drive on a 400 mile journey during a bitterly cold spell of weather and as a consequence was frost bitten, it was held that the employer was liable ¹²⁴. In another case ¹²⁵ it was suggested that if an employee knows that a machine has a tendency to throw out flying

123b Arya Muni V Union of India (1965) 1 LLJ 24 James V Hepworth K.K. Grandage Ltd (1968) 1 QB 94

124 Bradford V Robinson Rentals (1967) 1 All ER 267

125 Close V Steel Co of Wales (1962) AC 367 M/s J D & Co Mills V ESI Corporation AIR 1963 AP 210

parts so as to constitute a danger to the operator, this could amount to common law negligence on the part of the employer if he fails to take reasonable precautions

ii) If an employer purchased tools or equipments from the reputable supplier and has no knowledge of any defect in them his duty to take care is fulfilled and he will not be liable for negligence ¹²⁶ This will not be so if the equipment was purchased second hand from a scrap yard

It is submitted —

India needs statutes like Employer liability (Defective Equipment) Act and Employers Liability (Compulsory Insurance) Act by which the third party fault to be deemed a fault of the employer enabling the employee to get compensation and a wide insurance cover to meet personal injury claims from the employers

iii) If an employer knows defects in Tools or equipments he has bought, then he should withdraw them from use and circulation if he wants to avoid liability ¹²⁷

- c (11) Safe System of working : It consists in overall working pattern, the layout, the place of work, the system of power in use, the machinery and its distance from the operator, the trained personnel, capable supervision scope of training the display of warnings safety interlocking, protective clothing goggles special instructions of danger etc are all relevant constituents of safe system of working

126. *Davie V New Morton Board Mills* (1959) AC 604

127 *Taylor V Rover Car Co* (1966) 2 All ER 181 - A batch of chisels badly hard, - shattered injuring the plaintiff, the employer was held liable

In Barcock V Brighton Corporation¹²⁸ the plaintiff was employed at an electricity sub-station. A certain method of testing was in operation which was unsafe though quick and as a consequence the plaintiff was injured the employers were held liable.

If there are safety precautions laid down the employees must be told what they are and must be trained to utilise them. If safety equipments are provided, it must be available for use. In Finch V Telegraph, maintenance and construction Co¹²⁹ the plaintiff was employed as grinder. Goggles had been provided but he was not told where they were kept. The employers were held liable when he was injured by a flying piece of metal whilst doing his work where employer can prove that the employees were reluctant to use safety gadgets even after the provision by the employer, he may escape the liability¹³⁰. Does it mean that the duty of an employer is a passive one to provide safety gadgets and do no more? or is it an active one to exhort, propagate, instruct or compel their use?

It is submitted that answer to these questions can be given in four propositions as aptly pointed out by Dr Selwyn -

- " 1) If the risk is an obvious one, and the injury resulting from the failure to use the precautions is not likely to be serious, then the employers duty is a passive one of merely providing the precautions informing the employees and leaving it to them to decide for themselves whether or not to use them.

In Qualcast (Elverhampton) Ltd V Haynes¹³¹ an experienced workman was splashed by molten

128 (1949) 1 KB 339

129 (1949) 1 All ER 452

130 Macwilliam V Sir William Arroll Ltd (1962) 1 All ER 623 H L

131 (1959) AC 743

metal on his legs Spats were available, but the employers did nothing to ensure that they were worn The injury though doubtless painful was not of serious nature and the employers were held not liable

- 2) If the risk is that of a serious injury, then the duty of the employer is a higher one of doing all he can to ensure that the workman will use the safety precautions which are provided In Nalan V Dental Manufacturing Co,¹³² a tool setter was injured when a chip flew off a grinding wheel Because of the seriousness of the injury should such occur, it was held that the employer should have insisted that protective goggles were worn
- 3) If the risk is an insidious one or one the seriousness of which the employee would not readily appreciate then again, it is the duty of the employer to do all, he can, by way of propoganda, constant reminders, exhortations etc to try to get the employees to use the precautions In Indian Railways, the operating staff is subjected to this rigorous propoganda to observe safety rules and avoid accidents In Berry V Stone Manganese¹³³ the environment of the work place was o a very high velocity of noise Ear muffs had been provided but no effort was made to ensure their use It was held that as the workman may not appreciate the danger to their hearing without ear muffs, the employer were liable as they had failed to take steps to impress up on the workers the need to use the protective equipment.
- 4) when the employer had done all he can do, when he has not only provided the protection, but instructed on its use advised on how to use it properly, pointed out the risks involved in a failure to use and has given constant reminders about its use, then he can do no more, and from that time he will be absolved from liability " ¹³⁴

132 (1958) 2 All ER 449

133 (1971) 1 All ER 410

134 Selwyns Law of Employment IIInd Edn London, Butter works, 1978 p 131

c (12) Reasonably Competent Fellow Employees : If an employer engages an incompetent person whose actions injure another employee the employer will be liable for failing to take reasonable care. In Hudson V Ridge Manufacturing Co Ltd¹³⁵ an employee who was known to be prone to committing practical jokes, carried one of his pranks too far and injured a fellow employee. The employer was held liable. The answer in these circumstances is, after due warning, to dispense firmly with the services of such a person, for he is a menace to himself as well as to others.

In India, the Factories Act 1948 provides for safety of the workers against the risks involved in unprotected operations of machineries covering the protections of the children also. In certain big organisations like Railways there is a fullfledged safety organization which trains, propagates and psychologically equips the train operating staff to make it a habit of doing things safely to avoid accidents. This is applicable to departmental manufacturing and repairing shops and units in both private, public and cooperative sectors of industries treating chemicals, urea steel melting, power generation distribution and transmission activities. If any short-cut method of operation is applied by the employee ignoring the safety rules he is held responsible for the breach of the discipline even if no untoward event occurred. The safety cells are established invariably in those industries which are prone to cause accidents, leakages of gas, petroleum or other chemicals fatal to human beings or environment.

135 (1957) 2 All ER 229.

- d) Implied duty of the Employer towards the employees after the nexus of contractual obligation is snapped

Just as the Ex-employee has certain obligations of not divulging the trade secrets of his/her former employer or not to start the same business within a reasonable territory and time span likewise the Employer, after the operative portion of the contract comes to an end i.e. the employee retires and employer becomes a former employer has certain obligations to fulfil towards the employee so long as that ex-employee remains alive. The payment of Provident Fund and Gratuity is made in lump sum while pension is paid on monthly basis. So regular payment of pension and other benefits if any e.g. the Railways allow to their ex-employees free travelling facilities by granting of passes so long as that employees remains alive, must be ensured by the former employer.

A get-together of old mates, exchange of their experiences and expertise may be arranged by the former employer to enthuse new entrants as is done in the Defence Services but it cannot be counted as an implied obligation of the former employer. Though this practice may be a fit weapon of propaganda of the industrial management, the efficiency of the ²men and the material they produce

Regular Payment of Pension, medical care, yearly get together payment of Ex-gratia amounts, presentation of articles produced by the concern where the employee worked etc. may be suggested to be the obligations to be borne by the Ex employer or the employer. This obligation must come to an end at the demise of

the employee In case, the employer dies but the employee lives the successor of the employer must take care of the liability of the old ex-employees In case the concern dies, then the ex-employees should also be allotted shares prorata from the property of the concern just as creditors It is submitted that —

In case of pre-mature death of the employee, the concept of family pension has been introduced in government sector employment in the recent past That concept may be introduced in the industrial sector also to ensure the well-being of the family of the worker in case of his premature death or dying-in-harness So that at least one member of the family of the worker is appointed on compassionate grounds relaxing qualifications and age restrictions etc and / or a pension is granted till one of the member is not competent enough to take a job independently or to a stipulated period of time the worker would have worked and got his wages

CHAPTER - IV

LEGISLATIVE RESPONSE TO INDUSTRIAL
EMPLOYMENT LAWS IN INDIA

A Legislative impact on the Law of Industrial Employment in India :

Laws enacted by a legislature are supposed to be superior than judge made laws because the combined wisdom of those who represent the people in the legislature, is said to be the cause and effect of such laws. This study will be confined to such laws which relate to the minimum standards of industrial employment, social security of workers and a smooth industrial relationship between the employer and the employee. The development of the law relating to the above aspects may broadly be divided into the following periods

a) Prior to Independence of India, which may again be divided —

- i) From industrial revolution to Establishment of International Labour Organization (1850 to 1919)
- ii) After I L O to Independence of India (1919 to 1947)

b) Post Independence Era —

From (1947 to 1994)

i) 1850-1919 —

Before the advent of industrial revolution, the agriculture was predominantly the main avocation of Indian people and economy of the country. Villages were self sufficient and artisan craftsmen engaged themselves in cottage industries producing materials and goods of par-excellence quality. Machines, electricity, steam power ~~was~~ unknown though tools were used. The artisan was, usually advanced a loan to

purchase raw materials and to fulfil his personal needs. To repay the loan he agreed to work for the creditor - but because of exorbitant rate of interest and low wages for set off once a person so bounded himself for the other, never got a freedom from the shackles of such a bondage. Since customary laws were more in practice and under the custom once a labourer was indebted to an employer, he lost all freedom to work for any one else or to haggle over his wages until he could pay back what he owed¹ the bondage continued.

The same method of advancing loan to workers was employed in plantations of indigo, tea and coffee before the advent of industrial revolution in India to ensure availability of labourers. The plight of workers was very miserable and deserters were punished sometimes even flogged by the European Plantation masters².

The success of debt system was possible only by deceit and oppressions. In many cases the ryot was charged with the price of a stamp, indicating that the contract continued. In many cases men were held prisoners until they complied with the planters wishes³.

Though in 1843 the Indian Slavery Act had been passed to abolish Slavery in India but by 1859 because of passing of workmen's

1 Z.M.S. Siddiqui - Sanctions for the breach of Contract of Service 25 JIL1 (1983) p 359

2 Ibid p 360

3 Daniel Houston Buchanan, The Development of Capitalistic Enterprise in India (1966) p 45

Breach of Contract Act and Indian Penal Code 1860 the high handedness of employers coupled with the worker's timidity and ignorance of their rights, the workers had virtually reached to a state of defacto slavery. These two statutes strengthened the already intolerable hold of the employers over their workers. We may assume 1850 as the date of beginning of industrialisation in India, because as mentioned earlier textile Mills, Railways etc began functioning from 1851-54, though mining of coal in Raiganj Coal belt in Bihar began in 1820.⁴ The Law of Industrial Employment may be admitted to commence roughly from 1850 though in a very crude form. The question whether the state or the industry which came first is not very relevant for our purposes but even if we assume that handicraft industries existed irrespective of state existence, the law of industrial employment would not have been applicable to them because the industries in such cases happened to be dynastical confined to some expert artisans who gave their expertise from father to son and so on. There was no relationship of employer and employee of the present form and norm. The industries in those days were confined to families and guilds. The prototype production of modern time was not a forte of those days. The artisan was a producer and rest of the world customer yet, another arrangement, whereby, the customer placed his orders and paid certain money for raw materials and personal expenses of the artisan and on completion of the task the thing so produced was evaluated at then market price and after paying the balance money the customer could obtain the thing so ordered. But in practice,

4 K.N.Subramanian, Labour Management Relations in India (1967) p 7

after the passage of time, it so happened, that the evaluated price of the thing produced was always lesser than the sum advanced and the artisan was in bondage to produce for that customer only. As such, loan giving became a *modus-operandi* to trap not only the artisans but also ordinary labourers to keep a constant supply of labourers to Plantations, because dearth of labour was the main problem of planters.

The Indian Scene in mid fifties of Nineteenth Century may be depicted to have three distinct avocations —

- 1 Expert Artisans
- 2 Plantations and
- 3 Establishment of factories of cotton textiles, Jute, Indigo, iron and steel etc

The foreign investors had their capital locked in big plantations of tea, indigo and jute before the advent of factory system of production. The Planters were given legislative support to combat the problem of desertion of labourers from their work site. Some of the early enactments of those days may be enumerated —

- 1 The Apprenticeship Act 1850, which provided for learning trades, crafts and employment to find a livelihood
- 2 The Fatal Accidents Act, 1855, providing for compensation for loss occasioned by the death of a person caused by actionable wrong. The importance of this Act lies in the fact that at that time when it was passed, the law of torts had not developed in the country.⁵
- 3 Workmen's Breach of Contract Act, 1859, was enacted to contain the desertion of workers who received money in advance on

5 See *Union of India V Lalman* (AIR 1954 VP 17)

account of work which they contracted to perform and since the remedy of damages through civil suits was thought to be insufficient and inflicting of punishment to such persons who were so guilty of fraudulent breach of contract was essential the Act sought to fulfil the long felt needs of the planters ensuring availability of workers at their work sites situated at remote and distant places

The Act provided that a magistrate on receiving a complaint from an employer for a breach of contract should summon the worker and hold an enquiry. If the magistrate found that the workman had violated a contract on which he had received an advance, without a lawful or reasonable excuse, he was to order the accused either to perform the contract or to refund the advance. It is noteworthy that this order had to follow the wish of the employer as the Act gave to him the option either to ask for a refund of the advance or to compel the workman to perform the contract.

The Act was silent as to what would constitute a 'reasonable' or 'lawful excuse' and also as to whether a workman could refuse to work if the conditions of employment were inhuman or wages too low.

- 4 Section 490, 491 and 492 of Indian Penal Code, 1860 which came into force in 1862 also provided certain breaches of contract criminally punishable⁶ to help the employers in containing desertion of workers

o Workmen Breach of Contract (Revealing) Act, 1925 revealed sections 490 to 492 of IPC 1860 and the Workmen Breach of Contract Act, 1859

- 5 The Employers and workmen (Disputes) Act, 1860, as also enacted to provide for the summary settlement, by magistrate, of disputes over the wages of workers building railways canals and other public works and for criminal punishment of workers who violated their contracts Little more is known of it than its name, perhaps because it was sparingly used There is no reported cases under this Act ⁷
- 6 The Assam Plantation Act, 1863 was enacted to copewith the indentured labour problem by providing similar remedies of penal character against deserting labourers as a result of a commission of enquiry appointed in 1862 by the Government to probe the mal practices and ways to minimise them as prevalent in the Tea plantations This Act also did not work to obtain the desired results

The Commission of Enquiry appointed by the Government in 1868 reported

" The Labourers have too often been deceived by unprincipled recruiters They have come up expecting much higher wages and very different kind of life from what they found They have found themselves set down in a swampy Jungle far from human habitation, where food was scarce and dear where they have seen their families and fellow labourers struck down by disease and death and where they themselves prostrated by sickness, have been able to earn by far less than they could have done in their own homes "8

The above report found that these harsh employer practices (whereby fugitive labourer was flogged and compelled to work) and

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- 7 It had evidently become a dead letter long before 1931, Report of the Royal Commission on Labour in India (1931) p 337
- 8 J N Edgar, Report on Tea Cultivation in Bengal 20 Parliamentary Papers, 1874 vol XIVIII Cmnd 982

stringent legal provisions, however failed to prevent workers from leaving their jobs. A permanent labour force in the plantations could be developed only after the employers changed their attitude towards their coolies, by partly substituting "human relations" for the "rigid and cruel bondage".⁹

- 7 Factories Act 1881 was enacted¹⁰ to remove some of the abuses in the employment of workers in the factories and as such a beginning in the regulation of employment of women and children and their working hours was made. It was simply a beginning and adequate provisions were lacking.
8. The Indian Mines Act 1901, aimed at securing safe conditions in the mines,¹¹ was silent on providing any protection to women or children. It failed to provide definite working hours of the workers including women and children.

Thus scanty legislative response left free for exploitation of the workers by the capitalist employers who exacted work for 14 to 16 hours a day in unsafe and non-hygienic conditions paying very low and unjust wages, during the beginning of the industrial revolution in India which coincided with first Indian war of Independence nicknamed by the foreigners as Mutiny of 1857. This happening did one crucial thing and that was taking care of Indian affairs directly by the British Government and thus putting an end to the rule of East India

9 Ibid at 24

10 Factories Act 1881 was amended in 1891 and was repealed by Indian Factories Act 1911. It was again repealed by Indian Factories Act, 1934. The present Act is Factories Act, (LXIII of 1948).

11 This Act was repealed by the Mines Act (IV of 1923). The Present Act is Indian Mines Act (XXXV of 1952).

Company in India It was deemed essential to reorganise the courts and codify the law so that dispensation of justice may have a just base and people may not resort to revolt again The Indian Penal Code 1860, replaced the Mohomedan and Hindu criminal law together with the Elphinston Code as applied in Bombay Indian succession Act, 1865, settled the law relating to inheritance and succession in relation to Jews Christians, Parsis Anglo Indians and Europeans Indian Contract Act 1872 regulated the law relating to contract Negotiable Instruments Act, 1880 and Transfer of Property Act 1882 were enacted to provide a broad frame work of law relating to business contract, Transfer of property and Easements in India ¹²

The legislative intervention of the state in labour matters was first industry wise, touching e g indigo and tea plantations, then Factories and Mining and then Transport and lastly with general applicability The Tone of legislative intervention was first to suppress the aspirations of the labour and give a protective hand to the employer

In this process the 'law of Master and Servant' of Common Law was introduced in India There was no place, in conditions of service for natural justice in dismissals or limits of working hours or minimum or fair wages or timely payment of wages or payment of wages in cash or legal tender without undue deductions Master was free to 'hire and fire' He used to evade direct responsibilities

12 Justice Gulab Gupta Our Industrial Jurisprudence, 1987,
p 15

and consequences of accidents by the means of 'common employment doctrine' which implied that a servant must be supposed to have envisaged and agreed to take the risk of any injury occasioned him from acts of carelessness or negligence on the part of a fellow servants, and therefore if he met with injury by reason of any such event, the master would not be answerable to him on the principle of respondent superior.¹³ On the contrary the servant assuming the doctrine to be sound would thus be within the mischief of that other maxim 'volenti non fit injuria'.¹³ The Common Law Term 'Master' and 'Servant' described well of the relationship that was involved¹⁴ in relation to employment in nascent factory system in India

The establishment of factory system as a means of mass production brought in its wake, the system of collective participation and living of workers in a group in the vicinity of the place of their working. This led to collective thinking and 'Unionism' which was at first opposed by the employer but ultimately a legitimate acceptance was accorded by the employers and the law also provided its validity

Thus the advancement of the industrial jurisprudence in India during the early period of industrial revolution had been 'from property to person' that is from 'status to contract' as aptly stated by Sir Henry Maine in a different context (has now been exploded to reverse gear from contract to status)¹⁵

13 Barwell and Kar The Law of Master and Servant Vol I, Cal, 1952 p 93.

14 Friedman G H L The Modern Law of Employment, London 1963, p 30

15 See Hamlyn Law Lectures 35th series by Lord Hailsham p 57

ii) 1919 - to 1947 -

Background -

The malpractices prevalent in the factory system led the Government to appoint the Factory Labour Commission in 1907, and as a result of the recommendations of this Commission, The Factory Act, 1911 came into being to remove some of the short-comings. This Act regulated employment of women and children and for the first time a statutory limit of working hours was fixed for men. Though it was confined to textile factories only,¹⁶ yet a beginning to recognise the entity of labour was made.

Moreover certain events of first quarter of Twentieth Century cannot be overlooked. The first world war (1914-1919), generated the thinking of 'Nationalism' in the labour class and they began to unite, and in 1919, The first central trade union organisation of workers' i.e. All India Trade Union Congress came into being. The International Labour Organization also came into being in 1919 and India being its founder member had to ratify some of the conventions of the I.L.O. having a far reaching effect on the welfare and rights of the working class which found legislative shape from 1923 and onwards.

The awareness of workers so generated led them to participate in the freedom struggle of the nation focussing the attention of the government towards the exploitation of workers.

16 Justice Gulab Gupta. Our Industrial Jurisprudence
Jabalpur 1987 p 16

with general masses and a need for their removal became a bull's eye for the then government. To cope with a smooth expansion of industrial and reconstruction activities after first world war and the spirit of unionism which anyhow believed confrontation as a solution of all the problems, the government appointed the Royal Commission on labour in 1929 to suggest the solutions of labour problems. The effect on legislation was visible from 1931 and onwards because of this Commission which submitted its report in 1931. More or less with this background the following Acts were passed —

- i) Workmen' Compensation Act, 1923, to safeguard the interest of workers in case of accidents, occupational diseases out of and in the course of employment. The list of dependents, the fixation of amount on the loss of any organ, classification of injury leading to permanent and temporary as well as partial disablement etc. was as an attempt to minimise the points of dissensions. The notional extension of premises¹⁷ of the factory and disablement affects not only the capacity to work but also acceptability of labour¹⁸ i.e. its saleability to different employers etc. are some of the new trends developed by the judicial pronouncements. Setoff to compensation because of contributory negligence of the worker¹⁹ is also being looked at as the absolute liability of the employer in accidents in all

17 Works Manager C & W Shop EIR V Mahabir AIR 1954 All 132
J F Pareira V Eastern Watch Co Ltd (1985) 1 LLJ 472 (Bom)

18 Sukhai V Hukum Chand Jute Mills Ltd AIR 1957 Cal 601

19 Padam Debi V Paghunath AIR 1950 Orissa 207

cases because it is supposed lack of supervision to allow a worker to be in a position to be negligent. It is submitted the rate of compensation as provided in the Act is not compatible with the dearness of present time and needs revision.

- ii) The Trade Unions Act 1926 was enacted to give a legal validity to the concerted joint actions of workers and to enable them to form their own association. This act led to facilitate collective bargaining by the workers, and give them 'organized' status. Because of any person's ability to form an association of workers its multiplicity in one industry or at one unit is causing troubles of unnecessary competitions division in their unity and an opportunity of exploitation by the employers. 'One union in one industry' and 'no outsiders in the workers affairs' may be legally fixed.
- iii) The Trade Disputes Act, 1929 was passed to settle the disputes among the workers and the employers - but a more Comprehensive Act, the Industrial Disputes Act 1947, repealed it.
- iv) The Tea Districts Emigrant Labour Act, 1932 was passed to deal with workers employed in Tea plantations in Assam. Its scope was very limited. A more comprehensive statute covering all sorts of Plantations throughout India, known as Plantation Labour Act, 1951 has been passed, to cover the problems of plantation workers.
- v) The Children (Pledging of Labour) Act 1933, consisting of six sections was passed to prohibit pledging or labour of children.
- vi) The Payment of Wages Act 1936, was passed to ensure timely and cash disbursement of wages to the workers.

- vii) The Employment of Children Act 1938 was passed to regulate the employment of children in certain occupations by barring their entry into hazardous jobs. The child labour (Prohibition and Regulation) Act 1986 is the latest statute on the subject.
- viii) Employers Liability Act, 1938, was passed to bar the defence by employer of 'common-employment' in case of injuries to workers.
- ix) The Mine Maternity Benefit Act 1941 consisting of some eighteen sections and aiming to provide maternity benefits to women workers in the mines was enacted as a social security measure.
- x) Industrial Employment (Standing orders) Act 1946 was passed to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workers employed by them and to regulate day-to-day disciplinary matters and pinpointing the charter of duties and rights of workers vis-a-vis employers. Generally it applies to units employing hundred workers or more on any day preceeding the last 12 months, though by notification it can be applied to any enterprise or unit. This is very important legislation which concretises the contract of employment between the worker and the employer in real practice in the shape of standing orders so as to what the worker is to do, what behaviour will be treated as an act of indiscipline, Unfair labour practice, timings of the duty hours, procedure for grant of leave, rights of the workers, right and obligations of the employers towards the workers etc. are

detailed and placed at a conspicuous place after getting it certified by the certifying officer who certifies these motions of agreements after ascertaining the wishes of the workers and the employers

This statute was a trend setter in solving day-to-day dissensions as to what is indiscipline and what is the duty of a worker with the advent of trade unionism and collective bargaining new problems of maintaining industrial peace and production for the society were created. It was then considered that the society had a vital interest in the settlement of terms of Employment of industrial labour and thus the settlement of labour problems became 'tripartite' and the state, representing the society entered on the scene.²⁰ The applicability of the statute is confined to big units generally. It is submitted which may be reduced to every industrial unit conforming to the definition of industry.

The model standing orders as contained in the Act shall be deemed to have come into force, so long as the specific standing orders are not framed and applied.

The certifying officer shall see that the standing orders contain all the matters and items provided in the schedule and are in conformity with the provisions of the Act and are fair and reasonable. Certifying officer and the Appellate Authority have been vested with the powers of a civil court.

²⁰ Western India Match Co V Workmen AIR 1973 S C 2650. See also M/ Glaxo Laboratories (S) Ltd V Presiding Officer, AIR 1984 S C 505.

The modification of standing orders is permissible but not before 6 months of its certification. Right of modification vests in both the parties - workers as well as the employer. Procedure is same as the certification.

Contravention of standing orders is punishable under section 3. The schedule to the Act gives the list of matters to be provided under the standing orders. The changes, if any, brought by the appropriate government must find a place in the standing orders. The appropriate government may frame rules for carrying out the purpose of the Act and other matters as provided in section 15(2) of the Act.

Standing orders can be extended to non workmen provided such persons submit to the provisions of the standing orders as applicable to other workmen and the employer agrees to this. The agreement once in operation will come to an end after the completion of the Transaction.^{20a}

Standing orders have statutory force hence neither can be overridden nor contracted out.^{20b} Relying on the observations of the Supreme Court in Guest v. Williams Ltd vs P F Sterling,²¹ it was held by the High Court of Gujarat that the rights and obligations created by the standing orders derive their force not from the contract between the parties (workmen and employer) but from the provisions of the standing orders.²² Likewise where

20a Tata Iron and Steel Co V Sushir Chandra Untwalla F (1969) Lab IC 180

20b Western India Match Co V Workmen AIR 1973 S C 2650

21 (1959) 11 LLJ 405

22 Tata Chemicals V Kailash C Adhvarya (1965) 1 LIT 54 (HC Guj)

standing orders provide for 3 months of probation the employer by his contract with the employee cannot make this probationary period as 6 months ²³

Standing orders are binding on all employees past present and future The employees who were recruited previously but still continue the employees presently recruited absorbed taken as a whole or employees to be recruited in future all are amenable to the provisions of the standing orders ²⁴

Action in violation of standing orders is to be treated as void In the case of Bihar State Road Transport Corporation V State of Bihar ²⁵ The Supreme Court observed that if the termination of the service of the employee was the breach of a standing order the order of termination would never become operative and the employee would be deemed to be continuing in service of the employer ²⁶

Is it permissible to have two sets of standing orders for the same employees in the same concern ? Can there be standing orders shiftwise ? For answers one has to examine the clauses under the schedule, one by one A conclusion that there is no such scope for having two separate standing orders will be inevitable Itemwise there is no scope for two sets of standing orders for the same period covering the same employees in the same establishment

Likewise employee wise also two sets of standing orders cannot be

23 Behar Journals Ltd V Ali Hasan (1959) II LLJ 536 (HC Pat)

24 Agra Electric Supply Co V Aladin (1970) Lab 1C 411

25 AIR 1970 SC 1217

26 Western India Match Co Ltd V Rameshwar Pd (1971) Lab 1C 1447

operative one for one set of employees and other for different set of employees having different dates of recruitment One set before the dividing date and the other set after the dividing date If two different standing orders are allowed to operate it will amount to discrimination unless there is sufficient ground for such classification so as to make it reasonable, and ^{sure it} will not lead to uniformity and as such defeat the object of the Act Item wise two sets not permissible was the observation of the Supreme Court²⁷ and date as differentiation was also not permitted²⁸

The model set of standing orders can be enforced temporarily till the finally certified standing orders come into operation This model set of standing orders facilitates uniformity in operation of service conditions The models are one for general industrial establishment and other for coal mines The subjects covered in one's own standing order may be more than the subjects in model standing orders, but it cannot be less than those mentioned in the model. The amendment of section 4 of the Act by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1966 sec 32 has changed the powers of the certifying officer enabling him to adjudicate upon the fairness or reasonableness of the standing orders and suggest² changes His orders are subject to appeal as well under section 6 of the Act Standing orders can be a subject matter of industrial dispute²⁹

27 Salem Erode Electricity Distribution Co (P) Ltd V Their Employees Union 1966 I LLJ 443 (SC)

28 Guest, Keen Williams Pvt Ltd V P W. Sterling (1960) 1 SCR 348 Agra Electric Supply Co V Aladin (1969) 11 LLJ 540 (SC)

29. See Sec 10 of I D Act Second Schedule item (2)

Though standing orders are not law in strict sense it has been held in a number of cases that they have the force of law and constitute statutory terms of Employment³⁰ The Supreme Court has expressed the view that standing orders have a statutory force³¹ But they cannot override the provisions of any statute³² Standing orders acquire the force of law in the sense that there cannot be any individual contract of employment contrary to their provisions The Industrial Tribunal cannot disregard them on so far as the matters are covered by them But if an industrial dispute is raised regarding propriety fairness or reasonableness of standing orders the Industrial Tribunal will have the powers to modify them³³

Standing orders are not exhaustive and it cannot be contended that what is not provided in the standing orders cannot be a term of employment A misconduct, if not included in the standing order but an employee commits some serious misconduct which is normally considered as a justifiable ground for disciplinary action, it would be unreasonable to contend that despite such a serious misconduct he should be deemed not to have committed any misconduct³⁴

Terms of standing orders prevail over the terms of contract of ~~of~~ Employment between the employer and the employee which is in conflict with such orders³⁵ As such standing orders will override

30 S Ghosh and others V Dulia & others 32 FJR 248 (Raj H C)

31 Bagalkot Cement Co V R K Pathan AIR 1963 S C 439

32 Workmen of Buckingham and Carnatic Mills Ltd V Buckingham and Carnatic Mills Ltd (1970) 1 LLJ 26 (SC)

33 Bhaqalpur Electric Supply Co Ltd V Its Workmen (1951) 11 LLJ 203 (LAT)

34 Express News Papers Ltd V Industrial Tribunal (1961) 1 LLJ 100

35 Srivastava S.P V Banaras Electric Light and Power Co Ltd (1970) 1 LLJ 394

the implied terms of the contract of employment between the employer and employee also. But in M/s Hindustan Lever Ltd v Union Carbide India Ltd³⁶ an agreement between the parties that in case of dispute about the employees who could not be treated as workmen, the management will not oppose if the employee claim to be workmen and proceed accordingly, the agreement was held to be valid and treated as estoppel against the management.

The social security legislations passed before the independence to ensure the welfare of workers in mining industry particularly in coal and mica regarding their P F Bonus and other general welfare problems, are as follows

- XI) Mica Mines Labour Welfare Fund Act, 1946
- XII) Coal Mines P F and Bonus Scheme Act, 1946, and
- XIII) Coal Mines Labour Welfare Fund Act 1947

They apply to their respective fields and cover the welfare packages of the workers engaged in Mining Industry

XIV) Industrial Disputes Act 1947

This enactment was intended to make available the modalities to resolve the disputes and minimise the points of confrontations by precisely locating and defining the base of contentions between the workers and the employers, so that then ravaged economy by second world war may not suffer through work stoppages, strikes and lockouts. This statute minimises the disputes and if a dispute arises, gives its solution by providing many forums both to the workers as well as the employers. It seeks redressal of grievances

and perpetuation of industrial peace to get uninterrupted production

This enactment covers the whole of India. Investigation and settlement of industrial disputes are its main object. The object of all labour legislation as pointed out by the Supreme Court is to ensure fair wages and to prevent disputes so that production might not be adversely affected.³⁷ In workmen of Dimakuchi Tea Estate V Management of Dima Kuchi Tea Estate³⁸ the Supreme Court pointed out the main object of the Act as follows —

- i) The promotion of measures for securing amity and good relations between the employer and workmen
- ii) An investigation and settlement of industrial disputes between employers and employees, employers and workmen or workman and workmen with a right of representation by a registered Trade Union or Federation of Trade Unions or Association of Employers or a federation of Association of Employers
- iii) The prevention of illegal strike and lockouts
- iv) Relief to workmen in the matter of lay-off, retrenchment and closure of an undertaking
- v) Collective bargaining

The Industrial Disputes Act is a progressive measure of social legislation aiming at the amelioration of the conditions of workmen in industry.³⁹

37 Banaras Ice Factory Ltd V Its workmen AIR 1957 SC 167

38 AIR 1958 S.C. 353

39 S N Rai V Aishwarnath Lal AIR 1960 Pat 10

This Act provides a number of authorities to resolve the disputes between the contesting parties. Right from the works committee at the plant level to conciliation officers, Board of conciliation, Courts of Inquiry, Labour Court, Tribunal and upto National Tribunal for settlement of industrial disputes have been provided for in the Act. Powers, Functions and duties of these authorities are commensurate with the needs of the situation but everyone of them tries to ensure industrial peace. The disputes to industrial tribunal may be referred either by an agreement of parties to the dispute or by the State Government if it deems it expedient so to do. An award given by the Tribunal shall be binding on both the contesting parties for the specified period not exceeding one year. In case of delay or hesitation by any party to enforce the award the government will enforce it.

To keep peace strike and lockouts are barred during the pendency of —

- a) conciliation and adjudication proceeding
- b) settlements reached in the course of conciliation proceedings and
- c) awards of Industrial Tribunals (made binding by the appropriate Government)

Under the Act the appropriate Government has been authorised in public interest or emergent situations to declare the transport (other than railways) coal, cotton textiles, food stuffs and iron and steel industries to be a public utility service for the purposes of this Act for a maximum period of six months.

A proper procedure and compensation must be followed and paid before a workman is laid off or retrenched. Failure of any of them nullifies the result and the workman stands again at his original place with full wages. In case an undertaking is closed or transferred the compensation to the workmen accrues.

The fifth schedule of the Act specifies the practices which are unfair labour practices.

The Act defines kinds of strikes, wages, overtime, Dearness Allowance, Bonus, Workman, Badli workman, Retrenchment, Lockout, Closure, Layoff, Industrial Dispute, Industry, Employer, Award, Arbitrator etc. to precisely clear all doubts about the meaning and contention these terms carry so that disputes may be contained.

Some new Trends in the Industrial Disputes Act 1947 may be mentioned as follows -

Section 25A to 25J were added in the Act by the Industrial Disputes (Amendment) Act 1953. This amendment clarifies that section 25C to 25E will not apply to industrial establishments in which less than 50 workmen on an average per working day have been employed in the preceeding calendar month or which is of seasonal character or where work is performed intermittently. The question of continuous service is resolved by section 25B. The right of workmen while they are laid off to get compensation is drafted in section 25C. The procedure of Retrenchment Compensation and compensation to workmen in case of Transfer of undertaking is given in section 25(F) and 25 (FF) respectively. Sec 25 (F&F) provides for compensation in case of closing down of an industry.

An individual workman is now capable of raising an industrial dispute provided the dispute is connected with dismissal discharge, retrenchment or termination of service of that workman⁴⁰ In enacting section 2A, the intention of the legislature was that an individual workman who was discharged, dismissed or retrenched or whose services were otherwise terminated shall be given relief without its being necessary for the relationship between the employer and the whole body of employees being attracted to that dispute and the dispute becoming a generalised one between labour on the one side and the employer on the other⁴¹

The Industrial Disputes (Amendment) Act, 1971 added section 11-A in the Act. It curtails the power of management and enhances the power of tribunals to such an extent that now the tribunal can substitute its own findings and punishments⁴²

In 1976 chapter V-B was added to Industrial Disputes Act 1947, to enact special provisions relating to layoff retrenchment and closure in certain establishments employing not less than 100 workmen on an average per working day for the preceeding 12 months. The conditions precedent to retrenchment of workman has been provided for in section 25 N and procedure for closing down an industry has been laid down in section 25 (o). Penalty for layoff, retrenchment and closure without observing proper procedure has also been provided for in sections 25 Q and 25 R.

40 See Sec 2A of Industrial Disputes Act, 1947

41 Chemicals Fibre of India V D G Bhoir AIR 1975 SC 1660

42 Scooter India Ltd V Labour Court Lucknow AIR 1989 SC 149 - the power of Sec 11-A is exemplified

A new section 9-C has been added by the Industrial Disputes (Amendment) Act 1982 whereby a new chapter II-B has been inserted in the Act. It provides setting up of Grievance settlement Authorities and reference of certain individual disputes to such authorities. The industrial establishment in which fifty or more workmen are employed on any day in the preceeding twelve months shall provide for such a Grievance Settlement Authority.

Likewise section 17-B was brought into force from 21st Aug 1984. This section provides for payment of full wages last drawn by the worker if the dispute is dragged by the employer on pretext of Appeal to the High Court or the Supreme Court as a delaying tactics so that the workman may starve and should not contest the dispute. This amendment has provided an equal footing economically to the workman to combat at the evil designs of the employers who desire that the workman must surrender because of hunger due to delay in decision because an honourable re-instatement would be possible only after a long time.

Post Independence Era Legislations After the Independence - (1947 to 1994)

We got independence in the year 1947. The next year - 1948 the following statutes were passed:

- 1 The Dock Workers (Regulation of Employment) Act, 1948
- 2 The Minimum Wages Act, 1948
- 3 The Employees State Insurance Act, 1948, and
- 4 The Mines and Minerals (Regulation and Development) Act 1948

To keep peace at Sea-ports it was very necessary to have an uninterrupted flow of goods at Sea-ports from foreign countries as such the regulation of employment of Dock workers was very necessary so that contractors grip and exploitation may be lessened and newly won independence may flourish, having this end in view, the Dock Workers (Regulations of Employment) Act 1948 was passed

The dispute for wages is perennial and to fix atleast the minimum was thought necessary and to give this a concrete shape Minimum Wages Act 1948 was passed with modalities to fix Minimum Wages in notified industries.

To give a cover of insurance to the absence of workers because of sickness the Employees State Insurance Act, 1948 was passed. It envisages a contributory scheme which covers sickness, accidents and injuries of the employees to be taken care of by the corporation by giving monetary and medical assistance to the employee. A list of dependents and modalities of care and assistance is provided in the Act.

The Mines and Minerals (Regulation and Development) Act 1948 emphasises more on safety aspect of the mines operation and as such may be treated as a welfare statute.

In the year 1949, The Industrial Disputes (Banking and Insurance) Companies Act, 1949 was passed to cover the disputes of employees of these infrastructure industries. The Industrial Disputes (Appellate Tribunal) Act, 1950 was passed to provide avenues of appeals to industrial disputants.

The Indian Constitution and the workers Interests

The Indian Constitution came in operation on and from 26th January, 1950. The awakening in Labour force, the pledges of the leaders to build a new India free from exploitation poverty squalor and unequal distribution of produced wealth led to provide for 'social justice' which constitutes the core of our industrial law⁴³, in the shape of Fundamental Rights and Directive Principles of State Policy in the constitution itself.

Part III of the constitution entails Fundamental Rights of the people. It provides for equality of opportunity⁴⁴ with protected discrimination to uplift the status of weaker sections of society prohibiting begar⁴⁵ and child labour⁴⁶. The interests of the employers was served by Article 19(1)(f) whereby their claims of right to carry on any business as a property right subordinated the claims of workers for a better deal and any attempt by the Government to ameliorate the lot of workers was treated by the employers - capitalists as infringement of their fundamental rights guaranteed by the constitution. To meet the socialistic urges of the electorates the Article 19(1)(f) was amended by the 42nd amendment of the constitution in 1976, as Article 300-A, i.e. the property rights now have been made only a constitutional right instead of Fundamental Rights to clear and boost the tempo of economic and industrial development in socialistic pattern. The

43 Justice Gulab Gupta - Our Industrial Jurisprudence
Tabalpur, 1987, p 2

44 Article 14 to 18

45 Article 23

46 Article 24

Directive Principles of State Policy (Part IV) of the constitution are no more a pious declaration rather on their basis welfare legislations are coming to fore to make them a reality. A Living and decent wage, equal pay for equal work, participation of workers in the management⁴⁷ are no more confined to lofty ideas but legislations are coming to give these ideas a concrete shape. In the zeal to provide some concrete welfare, the following statutes were enacted —

- 1 The Plantations Labour Act 1951
- 2 The Mines Act 1952
- 3 Coal Mines (Conservations & Safety) Act, 1952
- 4 The Employees Provident Fund and (Miscellaneous Provisions) Act, 1952

The above statutes were passed to boost the tempo of welfare generally and specifically to cover mines and Plantations. So far, a neglected lot.

A Tripartite Central Board of Education was also established in 1958 to educate the workers generally and specially in the Trade Union philosophy, their rights and duties, collective bargaining methods etc. The purpose was to instil in the workers the norms of trade unionism on democratic pattern to achieve constructive ends and formulate a responsible attitude, not always seeking confrontation for solution of problems.

The Employment Exchanges (Compulsory notification of vacancies) Act, 1959 was passed to help in placing persons according to their

47 See Article 38, 39A, 41, 43, 43A of the Constitution of India

qualifications. The following statutes and schemes have been passed for the welfare of workers during the post independence period.

The maternity benefit Act 1961 was passed to cover all women workers to avail maternity leave for 6 weeks before and after the child birth. To give a fillip to population control this provision may be restricted to be available only for 2 or 3 child births.

The Bonus Act 1965 earmarks the rate of bonus and irrelevancy of paying capacity of the employer. To make it useful the bonus has been linked with productivity. The yearly clamour and agitation has been contained by this Act.

By Essential Services Maintenance Act 1968, the appropriate govt ~~govt~~ has been empowered to declare a particular industry into the category of essential services and any strike in that service to be, if resorted, as illegal.

The hue and cry regarding the contract labour and the exploitation of workers under the system, has been tried to be barred by the contract labour (Regulation and Abolition) Act, 1970.

The Employees Family Pension Scheme 1971 This scheme provides for a substantial long term protection to the family of the worker member who dies pre-maturely in service. The benefits provided under this scheme are family pension, life assurance benefits and retirement cum withdrawal benefits.⁴⁸

48 See Sec 6A of Employees P F Act and Miscellaneous Provisions Act 1952.

Payment of Gratuity Act 1972 emphasises that after completion of 5 years of continuous service a worker is entitled for the payment in the event of retirement or resignation superannuation, death or disablement due to accident or disease, @ 15 days salary for each completed years of service not exceeding 20 months wages on the basis of last pay drawn with 93% of D A or Rupees 2.5 lakh whichever ever is greater. The completion of 5 years continuous service is exempted in case of death or disablement.⁴⁹ The amount of gratuity can be recovered from the employer.⁵⁰

Employees Deposit-Linked Insurance Scheme 1976 : This scheme provides that in the event of the death of an employee who subscribes to the Provident Fund in an establishment covered under the Employees P F & Miscellaneous Provisions Act, 1952, the persons entitled to receive his P F accumulations would be entitled to an additional payment, equivalent to the average balance with provident fund of the deceased during the preceeding three years, subject to a maximum of ₹ 10,000/-⁵¹

Beedi workers Welfare Fund Act, 1976 earmarks the welfare of Beedi workers who usually work at their home and hence lack collective spirit for bargaining and other casualties.

The Bonded Labour System (Abolition) Act 1976 declares the system of bonded labour as illegal and those workers who are so bonded become free from the clutches of their employer from the date

49 Payment of Gratuity Act, 1972 Section 4 (1)

50 Id Sec 8

51 Indian Labour Year Book, 1988 p 210

of enforcement of this act i.e. 25/10/1976. The District Magistrates are the enforcing agency under the Act. It needs diversification⁵² so far as enforcing machinery is concerned.

The Equal Remuneration Act 1976 was to fulfil the longfelt demand of workers of equal pay for equal work and end of discrimination between the wages of men and women for the same job. Unfortunately this Act has not guaranteed equal pay for equal work among men workers leading to litigation.⁵³

Sales Promotion Employees (Condition of Service) Act 1976 also provides for the welfare of sales promotions employees who are usually on hectic tours away from their families.

Inter State Migrant Workmen (Regulation of Employment and Condition of Service) Act 1979, accords protection to workmen who migrate from one state to the other. The workers remain in the other state just like a refugee needing every sort of help and protection. They are exploited by the contractors as well as by the principal employers. It needs a protective coverage to intra-state workers as well i.e. the workers who migrate from the rural area to urban area within a state.

The Child Labour (Prohibition and Regulation) Act 1986 provides a total bar of children below the age of 14 years for employment to hazardous occupations.

52 Section 4 10 of the Bonded Labour System (Abolition) Act 1976

53 See Vishnupriya Y. "Equal Pay for Equal Work in India, Myth and reality," (1991) 1 SCJ p 83

To sum up we may agree that the attitude of Government towards labourer's condition and aspirations and consequently the nature of labour relations laws which are the direct result of that attitude has three well marked phases in every democratic country. These phases are - opposition, toleration and encouragement rotating in cyclic order. Opposition gives place to toleration, toleration to encouragement and encouragement again to opposition in the life cycle of a democratic state.⁵⁴

The attitude of the Government in the beginning of industrial revolution in India was that of firstly indifference and then of opposition to labourers' aspirations and welfare as it appeared from the various legislations of that time.⁵⁵ The second phase of the cyclic order where toleration is the norm covers the passing of the Factory Act 1881 whereby certain fundamental values of labourers' rights and existence were allowed. The third phase of encouragement contained the workmen's compensation Act 1923, Trade Unions Act 1926 and the Industrial Employment (Standing orders) Act, 1946 besides a number of amendments to Factory Act leading to the emergence of present Factory Act 1948. The re-cycling of the phase was not possible because of adoption of Indian Constitution in 1950, whereby under the framework of the socialistic pattern of society the norm of a welfare state is to be pursued.

Another significant attribute of Labour Legislation in India is its ad-hocism. The pressing aspect of a particular problem has

54 Halder S K. Evolution of Labour Management Relations
Calcutta 1953 p 3

55 See workmen's Breach of Contract Act, 1859 Section 490, 491, 492 of IPC 1860, Employers and Workmen Disputes Act, 1860 etc

been tried to be tackled. The result has been a lop-sided development of labour legislation. A compact and over all view of any problem has ever been taken into consideration. The number of statutes have increased but problems have not decreased rather more confusion, uncertainty and vagueness have emerged. For example, the term worker, wages, retrenchment, industry strike etc. have been differently described by different statutes and to seek a standardized meaning and a uniform application of the different terms the only course available is to look into different judicial pronouncement - which is not an easy task.

Consolidated codification has been attempted at by the title of 'Labour Relations Bill' for the last ten years or so but because of lack of a political will and opposition from the trade union leaders of different ideological pursuits the above legislation has yet to see the light of the day.

In the Indian Context, the labour problem has its different facets and some of them happen to be in the concurrent list of the Schedule to the constitution whereby centre as well as the states are competent to legislate over that matter. The different regional needs and the vast compass of the country justifies it, but so far as uniformity and comprehensibility is concerned the local and central legislation on the same subject requires, caution, care and adaptability, so that the public need be served instead of confrontations.

Though there is no consolidated legislation yet on every aspect of the law of industrial employment in India there is a

legislation either of state level or central level or the matter will be covered by the constitution itself Industry wages workers and their different kinds, equal pay for equal work, right to form their association and trade union activities recognition of their unions collective bargaining participation of workers in management position of a legal retrenchment, retrenchment compensation and in case of irregular retrenchment by not following the prescribed procedure, re-instatement of the worker with full backwages, has been established with legislative and interpretative processes of development of industrial law in India

On the front of social security the workers Provident Fund, Gratuity, Bonus Weekly rest, their minimum wages and its timely payment has been ensured Payment of Pension to industrial workers has been agreed upon in principle and in due course it will become a reality The good conditions of working with proper light, air, humidity and cleanliness is guaranteed The 'Safety' attitude in working as well as in implanting of safe appliances is a must at the work-site to eradicate the chances of accidents and ensure a safe working condition for the development of a safe health and hygiene of workers

In case of disputes, there are different avenues for their settlements available to workers as well as employer to maintain discipline and a good labour employer relationship Even a single individual worker in case of his dismissal, removal or discharge can raise an industrial dispute - the strength of the union can be well imagined The workers disputes can get its redressal through conciliation Arbitration, Adjudication and collective bargaining

including strikes. The Government can also refer the disputes for adjudication.

The constitution and various legislations prohibit exploitation of workers through Begar, low wages, increased hours of working without overtime, provision of improper rest, child labour and night working and underground working by the women workers. The system of bonded labour and child labour in hazardous occupations has been banned. There have been efforts to provide a proper care and protection even to migrant labour from one state to another. The workers' education and their training to become a responsible trade unionist, vocational trainings to cope with technological explosion and computerisation and to ensure their intrinsic mobility and opening of different channels of employment has been possible only through legislations or judge-made laws.

B Industrial Establishments and Law of Employment in India

a) Meaning and concept of Industrial Establishment

Industrial Establishments may be circumscribed with the places where industry is given a shape through the combined efforts of the workers, employers, transporters, salesmen and others. Hereby everybody seems to be occupied in some fruitful avocation.

The term industrial establishment has been defined by or mentioned in different statutes differently⁵⁶ as such we may include following activities as covering the subject matter of an industrial establishment.

56 See - Industrial Employment (Standing Orders) Act, 1946 and Payment of Wages Act 1936. The Employees State Insurance Act, 1948 mentioned the term 'Establishments' in section 2A and section 87.

- 1) All the means of Transport such as tramways railways air transport sea - transport etc including road transport propelled through machines except military operations by Road Air or Navy using such Transport
- 2) Plantations of all sorts including tea, coffee, Rubber etc
- 3) Mines quarry or oilfields or dock, wharf or Jetty⁵⁷
- 4) workshops or other establishments in which articles are produced adapted or manufactured with a view to their use transport or sale or in which any work relating to the construction development or maintenance of buildings roads bridges and canals or relating to operations connected with navigation irrigation or the supply of water or relating to the generation transmission and distribution of electricity or any other form of power is being carried on
- 5) Factory, where in Ten or more workers are working or were working on any day of the preceeding twelve months and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on or 20 or more workers are working or were working on any day of the preceeding twelve months without the aid of power in the said manufacturing process carried on in any part of the factory

An extensive definition of industrial establishment may be found in the Industrial Employment (Standing Orders) Act 1946 as

57 Mines Subject to the operation of Mines Act 1952, do not come under the purview of industrial Establishment of this category But mines are treated as industrial establishment under Industrial Disputes Act 1947 - Sec. 25-L

follows —

"2 (e) Industrial Establishment - The expression industrial establishment means and includes all the industrial establishments defined under —

- 1) The Payment of Wages Act 1936
- 2) All factories, as defined under the Factories Act 1948
- 3) A railway as defined under the Indian Railways Act, 1890 and
- 4) Establishments owned by a person who for the purpose of fulfilling a contract with the owner of any industrial establishment employs workmen

The industrial establishment in Indian Context signifies a place where some industrial activity or its cognate efforts are in progress. As per our details, industrial activities do not confine to manufacturing processes only. The sale and transport of articles are also included in it, though sale and transport for sale are sometimes called commercial activities. Since transport by bringing the article at a place where it was in scarcity is supposed to produce that article at that place, it may be treated as such a manufacturing process. Likewise, sale, though partly commercial, may be treated as a process under the larger purview of industrial activities.

The concern or the premises or the unit or the over all getup of the industrial establishment may be small, medium or large. It is small or big will be decided either by the amount of capital invested or the size of production or the number of employees.

engaged For our purposes the number of employees engaged in any day or as an average during the last preceeding 12 months shall be the criteria because it determines the applicability of many statutes⁵⁸ to certain legal entities e g a Factory an industrial establishment etc

b) Kinds of Industrial Establishments in India

Industrial Establishments are of the following forms in the different sectors -

- i) In the Private Sector the shape of industrial establishment may be a factory a joint stock company either public limited or private limited a holding company corporations cartels etc
- ii) In Public Sector it may be -
 - a) Corporations created by a statute or established under the Indian Companies Act, 1956 as Joint Stock Company,
 - b) Existing privately managed share companies when purchased by the Government or controlled by the government either by purchasing its more than 51% of shares or by taking over its management
 - c) Government opening or extending departmental operations of industrial activities through organizing a new department or extending the same department for industrial activities or establishing a new company to carryout the work of old department somewhat with a new style of technique and management e g RITES by Railways

58 Industrial Employment (S.O) Act 1946, Factory Act 1948 Industrial Disputes Act, 1947 The Employees State Insurance Act 1948 etc

(Rail India Technical and Engineering Services to Cater foreign country's railway needs)

d) Government workshops - The railways and defence depots have their workshops where byth produce the articles of their need

iii) Mixed Sector - where private sector is turned into public sector or vice-versa and both the systems co-exist

iv) Cooperative Sector - This sector in cotton Textiles Handlooms and other activities of Banking and Finance is crowning success not only in production but also in distribution Sugar Mills of Maharastra of this sector have been a boon to sugarcane growers Likewise dairies of Gujarat are not far behind

c) As-certainment of Employer in Public and Private Sector Industrial establishments

In the case of private sector industrial establishments the employer is either the individual capitalist or the partner of a partnership firm or the company managing its affairs through the directors and other official. because company has its separate and distinct entity⁵⁹ in the eye of law

Likewise in Public Sector setup of industrial establishments if the corporation/company has come into being through a statute or Indian Companies Act 1956 the company, corporation will have its own separate and distinct personality and as such will function through directors and other officials Thus, the employer in such a case will be the company having its own name and seal The company working

through its officials as provided in Articles of Association, such as Boards of Directors through Managing Director etc shall be the practical Employer on behalf of the company

In case of a 'Government Company' which is incorporated under the Companies Act 1956, having its entire share capital contributed by the government (Central State or both) and functioning of the company depends upon the directions of the Governments the Directors and Managing Directors shall be the practical employer because of the distinct separate entity of the company so functioning. The government will not be the employer and constitutional safeguard of Article 311 to the employees of such a company will not be available

In Public Sector, where government intervenes in an existing company either by taking over its management or share capital the employees remain the servant of the old company unless a new company is formed. For example, Banking industry was nationalised during the 70's, but all the banks were allowed to carry their old name and fame. The employees are still the servants of their old Bank getting more or less all the facilities of the government servants sans the invocation of Article 311 for procedural protection. Their services are controlled at lower strata through the Industrial Disputes Act, 1947 Industrial Employment (Standing orders) Act 1946 and at upper strata by Article 14, 16, 19 and 21 of the Constitution

The third kind of arrangement in public sector is that whereby a separate statute the corporation comes into existence (not by the Companies Act, 1956) and the Government holds more than 51% of the share itself allowing the remaining to be contributed by the public

or the government holds all the share capital either unitedly with central and different state governments or exclusively by the central or state governments or partly with state and state or central and state governments. Here also the employer is the corporation not the Government and though all the facilities of government servants are extended to such employees yet they do not enjoy the procedural protection of Article 311 as enjoyed by the Government servants. In mixed sector the last owner shall be the employer if it is the government the corporation shall be treated as a state under the concept of government instrumentality under Article 12 of the Constitution and if the corporation has been sold out to some private body that private body will become the employer - provided the Articles of Association is suitably changed.

To make it clear whether a body is an agency or instrumentality of the State in Som Prakash V Union of India,⁶¹ the Supreme Court of India has given certain guidelines. Thus the expression 'other authorities' in Article 12 of the constitution is not confined to statutory corporations alone but extends to a government company, a registered society or a body which has some nexus with the government as held in Ajeysa Hasia V Khalid Mujib.⁶²

The Cooperative Sector functions through its Secretary and President and being a registered body regulated by the State

60 R.D. Shetty V The International Airport Authority of India
AIR 1977 S C 1678

61 AIR 1981 S C 212

62 AIR 1981 S C 487 also See K C Joshi V Union of India,
AIR 1985 S C 103

functionaries is treated as state under Article 12 of the constitution

The legal position of the employees of these bodies which have been extended the status of 'State within the term other authorities' under Article 12 of the constitution is that they are not government employees because of the separate and distinct corporate entity of these bodies quite distinct from the state

The fact the employees of these bodies have not been accorded the protection of Article 311, because the courts are reluctant to pierce the corporate veil. The right of Article 14, 16 and 19 are accorded to such employees against the corporate bodies because of their being treated as State under 'other authority' of Article 12 of the constitution

In Mafatlal V Divisional Commissioner⁶³ the Supreme Court said —

" Thus the provisions of part XIV of the constitution shall not apply to a post held under local bodies like Municipalities District Boards and Panchayats etc. It is now clear that while civil servants may hold public assignments and carry out public duties imposed on them by law and remain a civil servant the servants of the public bodies although carrying out government functions as mentioned above do not become employees under the government so as to attract the protection of Article 311 of the Constitution "

d) who is an Industrial worker ?

One who works in Industries or industrial establishments in connection with the industrial production distribution sales

or service is an industrial worker. Then who is a worker? One who sells his labour or services for wages⁶⁴ is a worker. A worker is a human being who on the direction of the employer puts his labour at the industrial establishment in connection with some production, distribution or transmission process of the goods, articles, services etc. for a money recompense. A domestic and an agricultural worker so long as agriculture is not declared as industry must be distinguished from the industrial workers. The domestic servant or any other person employed casually for any other purpose than the employer's trade or business shall not be treated as industrial worker. Likewise, persons working in the capacity of a member of the Armed forces of the Union of India or states are also excluded from the purview of the industrial workers.

For creating a legal relationship of worker and employer, the employer must exercise some control over the working of the worker. It may be nominal or to the extent of giving of direction and assigning of task to be performed. If this link is missing the relationship would become that of a contractor. The power to punish is an attribute of employer-worker relationship.

The term employee is broader than a worker because the supervisor or manager is also an employee of the concern but not the worker. For a worker he should not be holding or performing a supervisory or managerial duty and should not be drawing as a basic wage more than Rs 1600/- per month.

64 The wages should not exceed Rs 1600/- per month to make him entitled for many benefits of calculations in Bonus, State Insurance etc. and his own category (Workmen's Compensation Act, 1923, Sec 4 Explanation II).

Broadly speaking every industrial establishment employs two sorts of employees - one, Managerial - less in number and in second workers - larger in number having different name or category, status and wage rates etc. These workers may again be divided into two main categories of skilled and unskilled worker depending upon their training education experience and expertise. Skilled workers are paid more and are entrusted with some sophisticated technical or prototype nature of job needing some expertise to man the machines used for production processes. Unskilled workmen are those workers who usually perform manual work just as loading, unloading of goods, digging by manual power using spade or gate keeping etc. The workers may again be categorised on the basis of their tenure of employment and it includes skilled and unskilled both in its ambit as follows in industrial establishments

- I - Permanent
- II- Temporary
- III- Badlis or Substitutes
- IV- Casual
- V- Probationers
- VI- Apprentices

The permanent workman is one who after successful completion of his probationary period has been confirmed against a permanent vacancy which lasts for an indefinite period and the incumbent is allowed to reach his superannuation. The number of permanent vacancies is arrived at after ascertaining the basic minimum manpower requirement of a particular industrial establishment. The fluctuation in needs are catered by engaging casual daily or temporary workers. Badlies or substitutes are engaged to counter

balance the short fall of workers because of sickness, marriage season festivals or training programme of permanent workers or to cater other casualties of permanent temporary or probationary workers for a temporary short period

Every permanent worker has to go through the period of probation before his actual confirmation against the vacancy. A probationary worker is one who is on observation regarding his fitness to the job, by the management. If found fit to be retained and confirmed for the post he has been selected against, otherwise after extending the probationary period once or twice if he is found unsuitable even after this extension he is terminated. A Temporary workman is engaged for works which is of an essentially temporary nature likely to be completed or over within a limited period. His services are terminated when the task is finished. Some Times permanent workers also begin their career with temporary status

An apprentice worker is one who is learner of the job and after training hopes to be absorbed at the establishment. During the apprenticeship, he may be given some allowance or he may be required to pay some fees. It all depends upon the popularity and job - surety element of the vocational training

The most diplorable condition of casual labourer/workers among the above categories of workers, needs some special attention to eradicate many an ill prevalent in context to them

The casual worker is promoted to Badlies or substitutes cadre after a long time and is used as a shock absorber of the fluctuations of man power needs of an establishment. This cadre of

casual workers suits to management very much and they try to keep the strength of this cadre even upto 30% to 35% of the permanent workers strength. This helps in reducing the cost of production as their payment is a daily wages without any allowances or with minimum other facilities. The permanent vacancy is kept at obedience to save costs. This is immorality against the interests of present and future workers.

Though through the legislation⁶⁵ and the Supreme Court of India⁶⁶ and Constitution of India it is a declared policy that there should be equal pay for equal work but in practice it is not followed and the glaring infringement is in the shape of engagement of casual labourers and paying them at the rate of daily wages. To minimise this there should not be at any time more than 5% of casual labourers to the whole strength of the permanent workers at an industrial establishment. By reducing the number of casual labourers the avenues of promotion and strength of permanent workers will enhance and the pinch of discrimination if any prevalent on casual labourers on any pretext will be lesser because of their small number.

The second malady prevalent in the field of labour relations in industrial establishments in India is regarding the fixing of a very low basic wage and to compensate the present total pay packet by allowing many kinds of other allowances very liberally. But the worker loses in the long term basis on account of low basic wages.

65 See Equal Remuneration Act 1976

66 Gopal Krishna Sharma V State of Rajasthan AIR 1993 SC 81
Surinder Singh V CPWD AIR 1986 SC 1504 etc

because on that very basic wages, other allowances e.g. Pension, Provident Fund Gratuity etc. is calculated and is based. As such, a proper basic wage must be fixed and workers should not be duped.

The problem of excess workers should be dealt with very meticulously - because any wrongstep leads to litigation and other agitational reactions from the worker's side. Thus creating interruptions in production and disruption in the peaceful atmosphere of the establishment as a whole.

A periodical review and man power planning must be resorted to by every establishment. Because of diversion of production or change of location or shifting to computerisation etc. if inevitable result comes in excess of manpower in a unit some voluntary retirement schemes⁶⁷, a further training and technique adoption programme etc. may be launched so that excess workers may be absorbed and if exit of workers is certain it becomes painless.

Concept of Security of Job :

The concept of Job-Security conveys the idea that the worker once employed will not be terminated at the whims of the employer. The Concept of 'Hire and Fire' is just opposite to this concept of security of job. The idea is that a person who is assured of his continuity in getting the job will put in his best talent in production processes because he will be having a mental satisfaction and saving of time and energy used in job searching.

The permanent worker, when he is confirmed after the probationary period carries a sort of status with his job. His

67 Golden Shake hand voluntary retirement scheme adopted by iron industry whereby a lump sum in lieu of remaining period of service was offered

'permanency' is protected by the law. His services can only be terminated after following the rules of natural justice and procedures prescribed by law. He is entitled to invoke the rights enshrined in Article 14, 16 and 19 of the Constitution of India, in case his job is at peril.

He, as such, gets the constitutional protection of natural justice. Industrial Employment⁶⁸ (standing orders) Act 1946, Industrial Disputes Act, 1947 wherever these statutes become applicable. The inference is that, when so many provisions are protecting the interests of the workman after he becomes permanent, the workman on his part also will do his best in the interest of the establishment, because he will be tension free from the exercise of searching for a job and in a position to regulate his routine and concentration. The security of job is treated as a welfare measure also because during the old age - the worker will not bother for seeking a job. The net income per month when the job is secure increases because the money spent in seeking a new job and the fallow days when no job becomes available is saved. As such the security of job, enhances the worldly status, pay packet and many other long term benefits side by side the legal status of the workman. The concept of social-justice concretises through the security of job provided distribution of 'permanency' in job has been from lower rung and without discrimination. Rules begin to flow after the 'permanency' but how this 'permanency' is to be achieved is without rules or scarce rules - this is an irony.

68 The Act is applicable to those establishments wherein at least 100 workers have worked at any day during the last twelve preceding months.

Security of Job Versus Efficiency

By making a worker's job secure the expectation was that his efficiency will improve and on this hypothesis - 'job security' That is a cadre of permanent workers was introduced In the beginning when measures of job security were introduced, the reaction of workers might have been responsive to loyalty, sincerity and efficiency and consequently production might have increased But in the present times the security of job to the workers has resulted in deterioration of the efficiency loyalty and sincerity

The moment a worker becomes permanent he begins to think that he from now on, cannot be terminated, his devotion to attain the permanency has come true hence he can do as he likes and in sequence his punctuality efficiency and sincerity begin to suffer and deteriorate This is no doubt ironical, but fact has to be tackled This is not true in all cases, but majority does like this

There may be an argument that job - security instils carelessness and irresponsibility This is not always true It differs from person to person and organization to organization In case of government employment it may be true but in case of industrial employment it may not be true wherever the cult of work - ethics is prevalent the security of job will enhance efficiency The system of accountability of one's performance if introduced and properly enforced the element of inefficiency would not be able to creep in The worker must be asked the progress of his assignment and wherever a worker feels difficulty in performing

any task, the management through proper guidance and consultation with experts, if needed, try to overcome that difficulty by making worker wise. An enthusiastic worker if fails to get proper guidance and regulation feels isolated and his best talent remains hidden because the management fails to create an outlet of his efficiency. Transparency in worker-management relations leads to efficiency where a worker indulges more in union activities after becoming permanent. He may be reminded of his basic duties and should not be allowed to avail of more facilities than is due to officials of the union. In no case nuisance should get any premium.

If the office bearers of the union are exempted from the allotted duties, then there is no clash between the efficiency of a worker and political activities in context to union of the same worker.

It is generally seen that those who have no job-security work very hard either to prove their merit for retention in the job or to show their indispensability in the employment. The casual labourer and daily wagers work hard in comparison to permanent workers is an open secret.

To keep efficiency, there must be a body to evaluate periodically the working of each worker and those found deficient must be taken to task by depriving of some lucrative benefits given to those who are found upto the mark.

The procedure of making workers permanent is not bad in itself - but after becoming permanent, if the workers do not feel their responsibility then through periodical evaluation such workers must be detected and should be reformed by the dual

technique of 'pleasure and pain' as the need be

The good workers may be stimulated by awarding cash certificate trophy and some title² etc, in recognition of their good work. It will inspire others also to emulate the award winners.

The quality control system which helps maintenance of quality of products may be used to maintain the quality of workers in principle. This will help in trimming the bad workers. By introduction of man-power planning the training and educational programmes for Apprentices etc may be chalked out according to the future needs so that trained personnel may be available.

Workers should have a transparent management and opportunities for exposure of their talents by arranging some competitions or soliciting their suggestions for improvements. The iron curtain policy or policy of segregation between the workers and the management should not be followed. The efficiency and security of job are not always correlative. Efficiency may be enhanced by having an open eye towards the needs of the workers. Some little irritative grievances of the workers may be taken care of expeditiously to make the atmosphere tension free and the result will be efficiency in output.

D. New Economic Policy and the Industrial Employment in India :

The legacy of adverse Balance of Payment, dwindling reserves of Foreign Exchange, inflation rate going to two digits, pledging of gold to foreign creditors, enhancement in the number of sick units of industrial production, static growth in employment avenues, led

the government to adopt a new revolutionary economic policy in India, which was declared in the Parliament on 24th July, 1991. The salient features of this new economic policy, in brief may be put as follows -

To dynamise the industrial production and enhance the avenues of employment, heavy doses of investment from all corners of the world has been envisaged. To this end, all restrictions, licenses and permissions have been abolished (barring some sensitive sectors like defence, atomic energy etc.) to ensure free flow of foreign capital and technology. The huge capital formation with new technical know-how to generate employment, production and prosperity is the aim, in short of the new economic policy. A Board for Industrial and Financial Reconstruction has been established to nurture the sick units. An agreement with GATT (General Agreement on Trade and Tariff) entered into and upper limit of the capital of those concerns abolished which come under the purview of MRTP Act (The Monopolies and Restrictive Trade Practices Act 1969). The chances of participation of workers in management, rehabilitation of retrenched workers and advanced technological training of workers is ensured to cope with the new situation because of globalisation and free-flow perspectives or integration with other economies and adaptation of new Technology research and development. The government will facilitate production and growth through improved transport, communication, power and other related infra-structure. The producer sector to undertake restructuring, rationalisation, integration, modernisation or expansion which would eventually help develop competitive edge. Mergers, amalgamations and other forms for

restructuring will have to play a major role in rehabilitation of sick industrial companies as an alternative means to rejuvenate them. Foreign Institutional Investors have been permitted to invest in all securities. Foreign companies have been permitted to hold 51% of the equity capital of Indian Companies ensuring their participation and control over the management. The crux of the policy is to attract investment from all corners and enhance industrial activities without interruption to increase exports and imports.

The new economic policy of liberalisation and globalisation was followed from July 24, 1991 by Prime Minister P V Narsingha Rao through his Finance Minister Dr. Manmohan Singh, to put India prominently on the global economic map by improving the country's economic vital statistics and to bring about a sea-change in the attitude of the people from the economic point of view by taking reforms to the grassroots and to every state of the country.

Four years after the start of the reforms the basic objectives seem to have been achieved as India the Asian Tiger has risen to prominence in the world and there is a definite change in the mind-set of the people and every state is racing to attract investment from almost everywhere. Now instead of industries demanding facilities from the government it is the government asking industries what facilities they want. Shilpa Bandhu Scheme which offers a single window clearance for the industries is in vogue in different states to facilitate all transactions regarding establishments of industries to be completed at one place instead of running from pillar to post as was the practice for every transaction previously.

With this kind of attitude the government has now towards the industry and the facilities and environment it is offering it is obvious that the industry is ²upbeat on the state Liberalization in licences, permission to every investor promise to provide infrastructure, tax holiday, subsidy in loans all speak about the keen efforts government is endeavouring to have industrialisation small as well as big to enhance production export, employment and contain inflation The first industrial policy resolution of 1948 emphasised upon the importance of small scale industries and the subsequent one in 1956 gave full recognition to the dynamic role which the small scale industries could play in the growth and development of capital scarce but labour surplus economy of India side by side, a beginning for heavy industries and scientific outlook was also emphasised to find a place for India in the world of economic progress of those days

The new economic policy of 1991 aims at accelerating industrial growth avenues of employment and excellence in quality of goods produced through competition For this, exchange of technology, men Machinery investment has been liberalised, collaboration with foreign multinational corporations permitted by allowing them concessions of free market taxation and other facilities The idea is to maximise industrial, trading transporting and other ancilliary economic activities at Indian soil by having a free flow of goods technology, money expertise and entrepreneurship

To have their existence secure, the Public Sector industries in India under the stress of new economic policy must be more efficient and capable of generating a higher rate of savings or internal surplus. By increasing the rate of savings the overall growth rate also increases. As such the Public Sector enterprises must earn a decent rate of return and operate in a competitive environment and for that the latest technology of financial engineering should be applied. The government should also reform its ownership functioning and be efficient and competitive. Instead of launching new enterprises the government should complete the ones at hand within the time schedule without accelerating its costs. The likely competition to be given by the multinationals and stress on privatisation of public sector industries may crop up problems of adjustment of the present management and production techniques to the extent of their survival - hence a cautious approach is the demand of many critics of the new policy. The containing of inflation rate within one digit and a mammoth foreign exchange reserves have been the apparent achievement of the new Economic Policy. At Industrial front also a growth rate of 4% to 5% per annum is visible, though 6% to 8% growth rate is the target.

Since the competition is meant in between the equals the apprehension is that our nascent industries may not be swallowed by the multinational corporations not only in terms of capital technology and products but also culturally - eradicating the Indian Culture.

Technology in the west to a large extent means substituting man power with machines not only to make life easier and safer for the Industrial worker but to save on the high cost of wages to compensate for scarce manpower and to focus on higher profits. It is to be noted that in most developed countries the rural population is around 5 percent whereas in India it is about 75 percent. The pressure of exodus to urban from rural areas is conspicuous in India and the urban slums offer no change or little change in the living conditions of the rural migrant. So Indian situation must not be forgotten in enforcing the new economic policy.

While much is spoken of global markets and the merits of economic liberalisation little is being done to train manpower in order to develop effectively placing greater monetary resources in the hands of the majority of the people. The optimum use of manpower resources in India to be equipped with the skills to unite quality and productivity to manual efforts is the need of the hour. Industrial Thrust should be on employment and not its replacement. This does not mean that large labour forces need to be drawn from the rural areas and deployed in industry. Given industrial scale wages earned through appropriate technological application the people will improve their life-style. They will be able to support and develop regional markets to meet their needs, helping the emergence of a balanced economy. The decentralisation of industries where in ancillaries and services to the 'mother' industries to be rural based employees being drawn from the neighbourhood would be cost effective and employment oriented.

The trade Union movement should understand the positive role of technology in the context of employment and strive to equate the consequent prosperity of the country with that of the worker. The worker should consider the country's prosperity as his own and as such an awareness should emerge reducing the number of strikes and lockouts, and making the unnecessary protests a thing of the history.

Let us hope that the new economic policy will be an Indian policy to accommodate Indian efforts in Indian spirit to give fillip to small scale industries also - because in Indian context nourishing of only big industries will not hit the cherished goal. Men oriented not machine oriented policies to be preferred, because it will help eradicate poverty and unemployment.

CHAPTER - V

COLLECTIVE BARCAINING AND ITS EFFECT
ON INDUSTRIAL EMPLOYMENT

1 Collective Bargaining Its meaning and purpose

The Industrial revolution brought in its wake the mass production of goods and service under the factory system of management, which resulted in concentration of economic power in the hands of the employer and thus making him stronger in bargaining power in respect of terms of employment and settlement of disputes with his workmen. The Industrial revolution also enabled the assembly of a large number of workers at factory site thus giving them an opportunity to unite and get organized if they so wished. An individual worker was no match against the mammoth power, skill, resources and negotiating strength of the capitalist employer. It was to protect the interest of individual labour against the capitalist employer that the trade union movement gave birth to the principles of collective bargaining.¹

In the context of the present day egalitarian society with its fast changing social norms a concept like 'collective bargaining' is not capable of precise definition. The content and scope of collective bargaining also varies from country to country. Broadly speaking collective bargaining is a process of bargaining between the employers and their workers by which they settle among themselves their disputes relating to employment or non-employment or terms and conditions of employment of the workmen on the strength of sanctions available to each side. Collective Bargaining is a form of settlement of industrial disputes of employer and the

1 MISRA S. Labour and Industrial Laws 12th Edn Allahabad 1968 p. 274

workers Its tool is negotiation, its power is strength of organised and united labour force on one side and the concentration of wealth skill resources and association of many things on the other side Its sanction or weapon is strike agitation, picketing etc in the hands of workmen and, 'Lockout' and threat of closure in the hands of employers It is thus the strength of the parties which determines the issues rather than the wordly duel which are largely put on as "any element of strength in one party is by the same token an element of weakness in another" ² The final outcome of the bargaining may also depend upon the art skill and dexterity of displaying strength by the representatives of one party to the other And, where the other determinants of strength are reasonably balanced between the two parties, conviction can easily be decisive ³

Collective bargaining can exist only in an atmosphere of political freedom ⁴ Collective bargaining is democracy in action in the sphere of employer-employee relations ⁵ In effect therefore collective bargaining is the technique through which industrial democracy works ⁶ The content and the scope of collective bargaining vary from country to country Broadly speaking the issues in collective bargaining relate to wages, hours of work various benefits provisions and other terms and conditions of employment.

2 K Alexander 'Collective Bargaining in Industrial Labour in India' Ed by V B Singh (1963) pp 384-85

3 Van D Kennedy 'Unions Employers and Government, 1966 p 117

4 Supra Note 1 p 274

5 Anand Prakash 'Trade Unions and Collective Bargaining in India' 1991 (IV) CILQ p 1

6 K N Subramanian Labour-Management Relations in India Madras 1967 p 556

Also involved are questions concerning the recognition of status of unions and collective bargaining procedures ⁷ Free collective bargaining implies the determination of the scope of the labour agreement negotiating procedures and substantive contract terms Resolution of differences in each one of these areas is looked upon as a private matter, to be worked out by a Union and a management under a system of free collective bargaining Legislation dealing with any of these areas constitutes a substitution of government directive for collective bargaining ⁸ Collective bargaining may be broadly defined as an agreement between a single employer or an association of employers on the one hand and a labour union upon the other which regulates the terms and conditions of employment ⁹

The process of reaching a collective agreement by collective bargaining is highly complicated one It involves complex interchange of ideas combining "argument horse trading bluff cajolery and threats" ¹⁰

" By its very nature it is rough-tough undertaking Its essence is the reluctant exchange of commitments, both parties want to give less and get more It is not qualitatively different from a business deal in which both negotiators have something less than hundred percent trust in one another Nor is it much different from the practice of diplomacy " ¹¹ "The best justification for collective bargaining is that

7 International Encyclopaedia of The Social Sciences vol 8, p 491.

8 George Taylor Government Regulation of Industrial Relations, Prentice Hall, Industrial Relations and personnel series -p 14

9 Ludwig Teller Labour Disputes and Collective Bargaining, Vol 1 New York, 1940 p 154

10 Supra Note 3 p 115

11 Neil W Chamberlain Source Book on Labour 1964 p 39

it is a system based on bipartite agreements and as such superior to any arrangement involving third party intervention in matters which essentially concern 'Employers and workers' ¹²

The object of collective bargaining is to harmonise labour relations, promote industrial peace by creating equality of bargaining power between the labour and the capital ¹³ whether labour seeks its ends by political power or by bargaining, its objective is to restrict the control of the employer over the property ¹⁴ But this end has not been achieved by the labour. The conscious and peaceful development of collective bargaining into a process that produces negotiated agreements made with full regard to public interest is the most constructive industrial relations programme available to labour and management. Once such a programme is undertaken policy for government intervention into industrial relations can be developed with a view to strengthening and facilitating collective bargaining instead of supplanting it ¹⁵ But the right of employees to join outside unions and the obligation of employers to deal with them have become accepted principle of public policy in the field of industrial relations ¹⁶ Collective bargaining should have a stabilising and not a disruptive function. Some unions look upon bargaining as a means to gain concessions and to participate in management. The

12 Report of the National Commission on Labour 1969 p 325

13 Supra Note 1 p 274

14 Selig Pearlman A Theory of Labour Movement New York 1920 p 5

15 Supra Note 8 p 33

16 A V. Raman Pao Collective Bargaining Versus Government Regulations, Madras, 1969, p 28

management feels its prerogatives are gradually getting narrowed in such an eventuality. That is no happy collective bargaining as both parties are indulging in an exercise of their stakes in the deal.¹⁷ The International Encyclopaedia of the Social Sciences earmarks the goals of collective bargaining in democratic industrial societies as, firstly wage and hour protection and improvement. Secondly social benefits and enhanced security through medical and health plan, unemployment compensation, pension plans and related arrangements and thirdly detailed regulation and determination of conditions of employment including lay off, promotion, job and personal compensation, discipline and discharge and other working rules and policies.¹⁸ Collective bargaining demands from both the labour and the management willingness to compromise and adjust and a readiness to recognise public interest. And that is why a 'Balance of Power' approach has come to be a pivotal point in public policy¹⁹ in relation to industrial relations.

As mentioned in the new Encyclopaedia Britannica, collective bargaining developed with the growth of Trade-Unionism especially from 1890 and onwards. A first effect of the extension of collective bargaining was to reduce pay differences which had been large, between the wages a given grade of labour received at any one time in different regions and in different firms in the same region and even between one man and another under the same employer.

17 Ibid p 92.

18 International Encyclopaedia of Social Sciences vol 8, p 492

19 Supra Note 16 p 96.

The introduction of collective bargaining has raised the wages of the workers concerned relative to the general level prevailing around them by some 10 to 15 percent

A second effect has been in the timing of changes when wages rises were the order of the day, unionized workers achieved them earlier than non-unionized and when the market was moving the other way the cuts of unionized workers were put off longer. The third effect has been in the ability not only to defer wage cuts in depression but also to reduce their amount.²⁰

The process of collective agreements normally takes one or the other of the forms namely negotiation, mediation and arbitration voluntary or compulsory.²¹ In negotiation, both the parties try to resolve the dispute through face to face discussion when negotiation fails mediation is resorted to where in a third party is entrusted to find the solution. The mediator is not a judge but a person who persuades both the parties in finding a solution. In Arbitration, where both the parties mutually agree for an arbitrator it is of a voluntary nature, while taking resort to arbitration because of some statutory provision will be treated as compulsory arbitration.

2. Collective Bargaining Its Development in England and in India

A- Position of U K. :

The early development of trade unionism in the wake of industrial revolution during the nineteenth century was not

20 The New Encyclopaedia Britannica, Micropaedia V 10 p 565

21 Supra Note 1 p 275.

encouraging. They were targeted for conspiracy in common law for restraint of trade for their concerted action. Thus making them liable for criminal punishments and civil damages in torts. Agreements among the members of a trade union to go on strike were treated as in restraint of trade and hence void. The Combination Act 1799 statutorily recognised these persecutions and this harsh situation lasted upto 1824 when this Act was repealed. But again in 1825 by an Act imposition of heavy penalties was provided for intimidation, molestation or obstruction of workers who were prepared to work in face of any ban imposed by the trade union. In 1858 an Act was passed making it lawful for strikers peacefully to persuade others to withdraw from work. Thus trade unions got statutorily a validity but under common law they were still unlawful bodies unable to proceed against defaulting members. On the recommendation of Royal Commission²² the Trade Union Act of 1871 was passed. It was this enactment that gave trade unions in the United Kingdom their charter. Trade unions got their legal personality and their actions were no longer to be treated as criminal conspiracies. For immunity from civil wrongs in restraint of trade etc. the Trade Dispute Act 1906 gave the complete charter but the collective bargaining as such had found its stimulus in the conciliation Act of 1896. 'Provisions for the Avoidance of Disputes' made after the strike of 1897-98 and amended in 1907, 1914, 1917 and 1927 stipulated three stage procedure if the dispute was not settled internally in the

22 Royal Commission established in 1867 gave report in 1871

form of 'work conference', 'Local Conference' and 'Central Conference' To meet the after war exigencies in 1945, airwages Resolution was adopted which gave a favourable swing to local collective bargaining which undoubtedly had developed during the second world war ²³

Presently in Britain there exist two separate systems of voluntary bargaining procedures At one level the formal and usually industry wide machinery may begin to operate at plant level but proceed systematically to national negotiation and the production of national agreements fixing basic terms and conditions for the whole of, or a substantial portion of, an industry This system grew from district negotiation during the first half of this century Since 1945 however the system of negotiating terms and conditions on a plant basis has almost replaced this national system in many industries ²⁴

In United Kingdom there is national level of collective bargaining as a result of which national substantive agreement emerge purporting to produce standard rates effective in all sections of the industry with agreed variations for certain local conditions ²⁵ The other method is of local bargaining where local machinery exists the worker side of it is likely to be in the hands of shop stewards, whether or not called by that name ²⁶

23 Roger W Rideout, Principles of Labour Law II Edn London 1976 p 22

24 ibid

25 ibid p 26

26 ibid p 28

In addition to the voluntary machinery there exists an official semi-compulsory system of wage bargaining through a wage council introduced by the Trade Boards Act 1909. It is now governed by the Agricultural Wages Act 1948 and the generally applicable wage councils Act 1959 which in turn has been substantially amended by the Employment Protection Act, 1975. Besides the above the following Machinery exist —

- 1 A wage council fixes remuneration for workers generally and by the Employment Protection Act 1975 it has been accorded power to fix any other Terms and Conditions for workers within its scope
- 2 Central Arbitration Committee was first established by the Industrial Court Act 1919. It was renamed in 1971 as Industrial Arbitration Board²⁷ and again renamed as Central Arbitration Committee in 1976²⁸. This is a form of arbitration to settle the dispute of employer and the workers
- 3 The Advisory Conciliation and Arbitration Service (ACAS). All the previously existing machinery has been brought under a single authority of the above name. It is an integrated one window service for resolution of workers and employers disputes
- 4 Court of inquiry or a committee of investigation is established to solve disputes of a particularly serious and/or prolonged nature

To sum up in Great Britain collective bargaining is emphatically based on democratic norms and individual freedom. The employer

27 Industrial Relations Act 1971 S 124 (1)

28 Employment Protection Act 1975 S - 10

supplies vital informations to the workers representatives for arriving at a solution Transparency of accounts and information (barring against ethics, security confidence and defence of legal proceedings) is maintained No discrimination is meted out in collective bargaining because of registration or non registration of a worker's union

B Position in India :

1) Development in brief - The Trade Unionism in India was treated as a criminal offence and liable for damages as well for conspiracy against the employer to harm him economically and for causing restraint to his Trade by instigating work stoppages in concert with other workers ²⁹ This was in brief, the position upto 1926, though the Madras Labour Union 1918 was one of the first well organized trade unions in the country developed according to modern concepts ³⁰ Likewise in western region of the country, Kamgar Hitbardhak Sabha in Bombay in 1909 and Mill Jobbers and Makaddams Union was formed in Ahmedabad in 1919 and the prestigious Textile Labour Association Ahmedabad was founded in 1920 ³¹

Little is known of the formation and activities of Trade Unions in Bengal prior to 1920 Between 1920 and 1929, some 140 employees organizations came into existence and of these about 54 went out of existence soon after they were started The predominance of the white collar group was in evidence from the very beginning of Trade unionism in Bengal ³²

29 See Setalvad, Common Law of India Hamlyn Law Lectures, London 1960

30 Supra Note 6 p 37.

31 ibid p 44-50.

32 ibid p 49

The unsatisfactory progress of Trade unionism during pre-independence days has been fully compensated by the tremendous growth of trade unionism during the post independence days. The mushroom growth has left hardly any category of workers without their own union.

ii) Present Position of Collective Bargaining Models in India :

The collective bargaining process in India for organised labour may be said to have two tier arrangement for solving the industrial disputes. The main policy decisions are struck at central level and petty local issues are solved locally. The Central Federations and Central Organisations for Central issues exert their might while branches or independent units which federate to some central organisation or affiliate to some central unit for protection and inspiration, look after the local issues. In India, All India Trade Union Congress, Indian National Trade Union Congress, Union of trade union Congress, Hind Mazdoor Sabha, Bhartiya Mazdoor Sangh are the central organizations of trade unions and have been organised on political beliefs and followings. For broad policy matters of industrial disputes representatives of each participate and on consensus press for the decision.

The union rivalry, leadership in the hands of outsiders, multiplicity of unions, recognition of collective bargaining agent inadequately equipped unions in respect of information support and long term demands for collective bargaining purposes are some of the problems faced by the Indian movement for collective bargaining as such and to overcome them legislative and judicial responses

have helped a lot. It is submitted, the weapon of strike in India where unemployed are in abundance, fails to bring its efficacy in long run and outsider leadership was a necessity because insider was exposed to victimisation and was not capable of mustering political support and solution as an outsider leader could do,

3 Collective Bargaining In India Legislative and Judicial response

A Legislative Response

The Trade Disputes Act, 1920, may be called the first statute in the direction of solution of industrial disputes. It provided for adhoc courts of enquiry and conciliation boards and prohibited strikes. The Trade Disputes Act 1929, enabled the government to intervene in industrial disputes and provided for conciliation machinery to settle disputes, peacefully. By this time Trade Union Act, 1926 which was implemented on 1st June 1927, came into being safeguarding the union activities of the members of a trade union³³ and giving the union itself if registered a legal status and personality³⁴. In 1938, the Trade Disputes Act was amended to incorporate appointment of conciliation officers for mediation and settlement of industrial disputes. None of these Acts were in common use as the policy of the Government was Laissez Faire and selective intervention at the most³⁵. The passing of Industrial Disputes Act 1947 has buttressed the cause of collective bargaining by providing conciliation, adjudication and arbitration as major means of solutions of industrial disputes. Works Committees,

33 Sections 17 and 18 of the Trade Union Act, 1926

34 Section 13 of the Trade Union Act 1926

35 Justice Gulab Gupta Changing Pattern of Industrial Disputes in India 1990 (iii) CILQ p 417

conciliation officer and Board of Conciliation are the authorities under the conciliation procedure. Labour Court, Tribunal and National Tribunal are the authorities for adjudication. A dispute may be referred to Arbitration also voluntarily or by the appropriate Government. The Office of Court of Enquiry is also available to enquire into any matter relevant to an industrial dispute.³⁶ After the independence we adopted our constitution which provides as a fundamental right a freedom to form associations.³⁷ Now forming of Trade Unions permits no bars. Likewise the Directive Principles of state policy provide equal pay for equal work for both men and women.³⁸ and tender age of childhood and youth are protected against exploitation.^{38a} Right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement within the economic capacity of the state is to be provided.³⁹ Humane conditions of work, maternity relief, a living wage and a decent standard of life and full enjoyment of leisure and social and cultural opportunities together with participation of workers in management has to be secured by the state.⁴⁰ As a sequel to these guiding principles Maternity Benefit Act, 1961, the Equal Remuneration Act 1976, Child Labour (Prohibition and Regulation) Act, 1986, Bonded Labour System (Abolition) Act, 1976 and schemes for workers participation in management, since 1974

36 See Industrial Disputes Act, 1947 Sections 3,4,5,6,7,7b
10, 10A

37 Article 19(1) (c)

38 See Article 39(d)

38a Article 39(c)

39 Article 41

40 Articles 42,43 and 43A

have come to fore Much has been achieved in regard to collective bargaining in India But what has been achieved is inspite of the law and not because of the law ⁴¹

B The Judicial Response :

The judicial response in furtherance of collective bargaining has been positive Implementation and applicability of collective agreements to all the workers of a given unit where more than one union exists and the agreement has been made with one of the unions, has been the focal point of anxiety and disagreement, because only settlements arrived in conciliation proceedings were given statutory status and binding force ⁴² Bilateral agreements between workmen or their trade unions, and employers were also given statutory recognition and enforceability by the amendment of 1956 to the ~~Indian~~ Industrial Disputes Act, 1947 But still there remains a clash of claims regarding the enforceability of such agreements in respect of their scope whether applicable to all or confined only to the parties to the agreement

A Bilateral agreement in between the management and the workers or their union without the intervention of conciliation machinery is binding in between the parties which arrived at the settlement while an agreement arrived at through the conciliation is binding not only on the parties to the settlement but is also binding on all the workmen of the establishment, whether such workmen are parties to the settlement or not, as decided by the Supreme Court in Ramnagar Cane and Sugar Company V Jatin Chakravorty ⁴³ on the theory

⁴¹ Anand Prakash Trade Unions and Collective bargaining in India 1991 (IV) CILQ p 10

⁴² Industrial disputes Act, 1947, Section 18 (3)

⁴³ AIR 1960 SC 1012

that the conciliation officer is required to ensure not only that the settlement is voluntary but also that it is fair and reasonable. The agreement arrived at between the parties outside the conciliation proceedings are binding on the parties to the agreements only, and will not cover all the workers as is the case in settlements arrived at through conciliation proceedings has been decided by the Supreme Court in many cases.⁴⁴ The court found itself helpless to go against the express language of section 18 of Industrial Disputes Act which makes arrangements outside conciliation binding only on the parties to the agreement.

In Herbertsons Ltd V Workmen⁴⁵, where workmen changing their loyalty formed a new union and arrived at a settlement with the management while the original case with old union as a party was still pending with the Supreme Court. It was a settlement outside the conciliation proceedings and binding only on the parties to the agreement. The company made an application to the court to pass judgement in terms of the settlement as the union with 193 members had agreed while the other union with 55 members was not agreeing to the settlement. The Supreme Court referred the matter back to the Tribunal to find out whether the agreement so arrived was fair and reasonable. The finding was that the settlement was partly fair and partly unfair. The Supreme Court was urged to decide the case on merits but the court held that when a recognised union negotiates with an employer workers as individuals do not come into the picture at all. Since the recognised union which is expected to protect

44 Jhagra Khan Collieries (P) Ltd V Central Govt Industrial Tribunal 1975 1 LJ 163 (SC) Tata Chemical V Workmen 1978 Lab I C 637 Security Paper Mill V R S Sharma, 1986 (1) LJ 432 (SC)

45 AIR 1977 SC 322

the legitimate interests of labour, enters into a settlement in the best interest of labour. The settlement being in the course of collective bargaining should be given due weight and consideration. This was a landmark judgment, but only after one year as pointed out earlier the Supreme Court held that the settlements outside conciliation had only limited applicability confined to the parties to the agreement.^{45a}

The Court could have, however, invoked the principle of the representative status of a majority union to make the agreements binding on all the workers. In not doing so it did a disservice to the growth of collective bargaining.⁴⁶

The enacted law for determining the majority status of Trade Unions is not in existence and the amendment to Trade Union Act, 1926, in 1947 for determining the majority status and recognition of representative union has not yet been enforced. Under such a situation, the Supreme Court must find a way. Section 19 of the Industrial Disputes Act, recognises the principle of majority of a party. Under Section 19(7), a notice to terminate an agreement or an award must be given by

" a party representing the majority of persons bound by the settlement or award, as the case may be "

The Court on parity of reasoning, could have held that an agreement with a majority union binds all the workers as well

45a See note 44

46 Z M. Shahid Siddiqui, ⁵ Principle of Majority Status of Trade Unions 28 JLL1 (1986) p 233

Supreme Court has encouraged and preferred collective bargaining in State of Bihar V D Ganguly⁴⁷ where it held that it would be wholly unreasonable for an Industrial Tribunal to insist upon adjudication of a dispute on merits, even after it has been informed that such dispute has been amicably settled between the parties. In such cases it should immediately make an award in terms of the settlement.

In Sirsilk Ltd V Government of Andhra Pradesh⁴⁸ a settlement arrived at between the parties to the dispute was given preference to an award which had already been sent for publication to the Government for its enforcement under the Act on the ground that once such a settlement is arrived at no dispute is left between the parties, hence award should not be enforced by the Government by publishing it.⁴⁹

In Amalgamated Coffee Estates Ltd V Their workmen⁵⁰, during the pendency of the special appeal, the court was informed that there was a settlement between the parties and the Supreme Court incorporated the award in its judgement after assuring that the settlement was not arrived at by fraud or collusion but was a result of voluntary agreement. The Supreme Court in this case extended the operation of the settlement to all other Coffee Estates also which were not parties to the agreement as the settlement was basically fair and reasonable and ensured uniformity in condition of service of workmen.

47 (1959) SCR 1191

48 AIR (1964) SC 160

49 See Section 17 of Industrial Dispute Act, 1947, which stipulates publishing of the award for its enforcement

50 1965 11 LLJ 110 (SC)

The recent trends of Supreme Court judgements have been more encouraging in favour of collective bargaining and settlements arrived bilaterally even compromises with formal compliance with Rules made under the Industrial Disputes Act 1947 to make such settlements binding

In Hindustan Lever V Management of Hindustan Lever⁵¹ the court gave sanctity to a settlement arrived at by Correspondence between the union and management

Similarly in Kuldip Singh V Punjab and Sind Bank⁵² a settlement recorded only by way of minutes of discussion between the Staff Association and the Management was held to be binding on the parties and accorded the sanctity of a collective bargaining settlement. In these cases workmen were represented only by one union as the industry was having only one union

4 Methods of Collective Bargaining

There are two types of bargaining procedures they are referred to, firstly as the contractual or static method and secondly as the institutional or dynamic method⁵³

- (1) Contractual or Static Method - In this method, the parties that is Employer or Employers or Employers Association and the workers union or unions come together negotiate arrive at an agreement and then disperse to renew their negotiations as the need arises either because the time of expiry of the

51 AIR 1984 SC 516

52 (1989) 11 LLJ 457

53 Kahn - Freund Sir Otto Labour and the Law (Hamlyn Lecture Series) London 1977 p 49

agreement approaches or if there is no time limit either side desires a change ⁵⁴

- (2) Institutional or dynamic methods - It consists in the creation of a Permanent Bilateral Body known as Joint Industrial Council a conciliation Board a Joint Committee on which both sides are represented by an equal number of members sometimes (in minority of cases) with an independent chairman presiding To this body the parties give a constitution and a code of procedure but they leave it to the body thus created by unanimous resolutions to settle the wages and other substantive conditions of the industry ⁵⁵

- In India both types of collective bargaining is prevalent In small industries which are more akin and open to the local influence the first method is practised In industries which have wide ramifications in terms of their countrywide locations and huge employment the second method is used

The institution of Joint Consultative Machinery popularly known as JCM particularly in existence in Government employment is scheduled periodically to meet and discuss the various demands of the employees The representatives of employee and the secretaries of the various departments of the government try to sort out the issues of Interim Relief, Dearness Allowance, Dearness pay merger of Dearness Allowance in pay, etc In case of no agreement with in this body the issues are referred to the Arbitrator

In certain industries tripartite if it happens in private sector, and bipartite if it happens in public sector, wage Boards

54 ibid r 52

55 ibid r 53

for a definite period of applicability of its awards are also coming up to ensure peace at least during the period the award is in operation

5 Collective Bargaining and Compulsory Adjudication

The process of mediation conciliation, investigation arbitration and adjudication are the means apart from collective bargaining to settle the industrial disputes. In collective bargaining the workers and the employers settle their disputes through negotiations without the interference of any third party and arrive at settlements voluntarily. In other methods of disputes resolution, as described above, the intervention of third party to arrive at a settlement becomes inevitable. When an industrial dispute ensues and prolongs it affects the interest of the society at large as well, hence the state cannot remain a silent spectator. This leads the state to act and it may refer the matter unilaterally to adjudication or with the consent of the parties to the disputes. Collective bargaining as a method is vulnerable for its encouragement of strikes for its lack of principled and scientific decisions and for its lack of the capacity to protect the community's interest. At the same time, the compulsory adjudication, apart from its greatest drawback of third party intervention is further vulnerable for its expense its delay, its bitterness and acrimony, its frustrations and for its many a wrong decisions. Hence with respect to the merits and demerits of collective bargaining vis-a-vis compulsory industrial adjudication there is a serious difference and overlapping of views.

It may be argued that collective bargaining without the intervention of a third party (agency) will alone lead to a healthy

development of Trade Union movement, and will, in the end, be conducive to the growth of industrial harmony. The State intervention by way of compulsory adjudication has hampered the growth of trade unionism in India as it supplants instead of supplementing the collective bargaining. Shri V.V.Giri had also a very strong opinion against adjudication.

" It has therefore, been ⁵ a firm conviction all these years that internal settlement of disputes is eminently to be preferred to compulsion from outside and that collective bargaining and voluntary arbitration should be encouraged in preference to compulsory arbitration "56

Weak Trade Unionism and Compulsory adjudication often though not always go together for compulsory adjudication is invariably the result of the pleadings of weak unions and of their inability to get on without it ⁵⁷. As such so long the Trade Unions attain sufficient strength to bargain with the employers from a position of equality, the moderates permit the continuation of compulsory adjudication for the settlement of disputes though they basically prefer collective bargaining as a means of solution of disputes. Disputes which threaten a prolonged stoppage of work in public utilities, core [†] industries of coal, steel, atomic energy or related to defence and security of the nation must be referred to the adjudication and in the discretion of the State whenever the State thinks it suitable and emergent the compulsory adjudication system may be resorted to. In India, during the second world war Defence

56 Giri V.V. 'Labour Problems in Indian Industry' (1960) p 86.

57 K.N.Subramanian : Labour Management Relations in India, Madras, 1967, p 498.

of India Rules were framed and under Rule 81-A, the disputes were settled by the intervention of state agency by barring the strikes and lockouts, that system in refined form still continues in the shape of compulsory adjudication etc But

"it ought to be realised, however, that once a country adopts compulsory adjudication it is not easy to reverse the pattern and move to freer collective bargaining."⁵⁸

To the objections against collective bargaining in India that Indian Unions were too inexperienced divided on political lines and their multiple numbers hamper the interest of their members that outsiders leaders of the union are too influenced by ulterior motives that demands might be exaggerated and number of strikes might increase, the answer as given by Van, D. Kennedy⁵⁹ was that Indian trade unionist were quite capable of viewing their responsibilities in unions, as western experience showed, if responsibilities in the form of effective bargaining rights were given to them. To the other objections that the Indian economy could not afford to have strong unions turned loose in the collective bargaining to make exorbitant demands, his reply was that weak unions denied bargaining rights and torn by unregulated rivalries made more extreme demands than strong bargaining unions

Adjudication by the very way of its functioning has inhibited the growth of trade unionism and collective bargaining and led them to litigation For demacray in industrial setup, the gradual transformation of adjudication to collective bargaining,

58 Professor Charles Myers, See Supra Note 57 p 556

59. Supra Note 57 p. 557.

seems the right direction to be adopted, because an abrupt change and banning of adjudication may not be conducive to the interest of the workers and the society as a whole. In a planned economy of development, as is ours, the work stoppages and unwarranted disturbances causing a danger to industrial peace and that too by unions which lack organisational maturity in the garb of collective bargaining cannot be appreciated. Equally strong therefore, are the views of Protaganist of adjudication to continue it in the present situation, and they argue that the right to strike is not a fundamental and inalienable right of the workmen in the present context of the Indian society. Negotiations, Mediations, Conciliations, Arbitrations and adjudications accordingly may be effective substitute of strikes and lockouts. A fortiori, the alternative to the failure of collective bargaining should not be a strike or lockout, if the planned progress of the nation is not to be retarded. It may be said that Adjudication should not be resorted to as a first step, barring a certain emergent and security related disputes.

"In case of failure of the negotiation, mediation concicilation and voluntary arbitration, the intervention of the government by way of compulsory adjudication can be an effective remedy to resolve the dispute" ⁶⁰

In other words, strikes should always be avoided and industrial disputes should be decided in accordance with the principles of rule of law ⁶¹

60. Roberts V. C., 'Industrial Relations : Contemporary Issues' (1968) p. 64.

61. Report of the National Commission on Labour (1969), p. 59.

Adjudication may have its defects but it has by and large succeeded in bringing about some measure of industrial peace in the country. But for the state intervention through compulsory adjudication, the industrial relations would have been worse, work stoppages longer and what is more important, condition of work would, have been less attractive than they are today, if disputes had been left to be settled by collective bargaining. The best course, therefore in the present situation would be to carry on with the existing procedure, trying at the same time to remove the obvious defects in the system through suitable improvements or modifications to make it more acceptable. The arguments which impell continuation of compulsory adjudication may be marshalled as below :

- i) that the circumstances which necessitated the provisions of compulsory adjudication when the Industrial Dispute Act, 1947 was enacted, still continue ;
- ii) that the parties, particularly unions are still unprepared and incapable because of organisational and other weaknesses to shoulder full responsibility of collective bargaining ;
- iii) that immediate withdrawal of state intervention through adjudication will lead to chaos in the industrial field, which the country can ill afford and
- iv) that there is always the third party to the dispute viz the community ; and the state representing the community, must have the right to intervene and compell the parties to submit to the decision of an adjudicator . . . empirical data can be no guide to settle the controversy 62

62 See Report of National Commission on Labour Ch 23 1R -1 p 326 (1969) ?

The National Commission on labour has noted that in a democratic system pressure on Government to intervene or not to intervene in an industrial dispute may be powerful, though it was not convinced that collective bargaining is anti-ethical to the consumer interests. Because,

- " The requirement of national policy make it imperative that state regulations will have to coexist with collective bargaining. At the same time, there are dangers in maintaining status quo. There is a case for shift on emphasis and this shift will have to be on the direction of an increasingly greater scope for and reliance on collective bargaining. But any sudden change replacing adjudication by a system of collective bargaining would neither be called for nor practical. The process has to be gradual. A beginning has to be made in the move towards collective bargaining by declaring that it will acquire primacy in procedure for setting industrial disputes."⁶³

As ~~the~~ a process collective bargaining cannot be put in a water tight compartment as against other means of dispute solutions. The method of compulsory adjudication is simply a process which is adopted when direct negotiations between the parties do not yield any result, hence, we may say that

- " the element of collective bargaining which is the essential feature of modern trade union movement i. necessarily involved in industrial adjudication "⁶⁴

6 Collective Bargaining and Community of Interest :

workers are human beings and a member of the society for which they produce. They are consumers and citizens also. They are a factor of production which is lively, thinking, aspiring and equal

63. *ibid* p 327.

64 *Bangalore Woollen Cotton and Silk Mills Co. Ltd. v Their Workmen* (1968) 11 LLJ 514 (517) (MYS) (DB) per Govind Bhatt J.

to the employer in terms of human existence Their share in production, their well being, their good conditions of working, their happiness etc will reflect on the society to which they belong The workers desire an equitable distribution of wealth which they produce while the employer wants maximum of profit at minimum of expenditure through his entrepreneurship Payment to workers in any shape is an expenditure to his enterprise and his interest is to minimise this by all means so that the cost of production will be less and quantum of profit greater So within the employer and employee relationship in the factory system of production, there is perennial clash of interests One party always trying to give less while the other party always trying to get more This clash under the system is perpetual Usually workers are never satisfied with the arrangements and pay packets they get Employers are always complaining that on the payment of wages and providing other facilities they are expending more than is justified The process of production must not stop but the demands of the workers cannot be stopped So there should be some method by which some solution is to be obtained The workers unite and form their union while employers also form their union or Association The employees with employer initiate a dialogue regarding their demands. Ludwig Teller states —

- " The whole process of such a negotiation is collective bargaining The Term 'Collective' as applied in collective bargaining agreements will be seen to reflect the plurality not of the employer who may be parties thereto, but of the employees therein involved Again, the term collective bargaining is reserved to mean bargaining between an employer or group of employers and bonafide labour union "65

Ludwig Teller further asserts that —

" Indeed in the collective bargaining agreement is to be found a culminating purpose of labour activity "66

It is well known, how before the emergence of Trade Unionism and collective bargaining, labour was at a great disadvantage in obtaining reasonable terms for contract of employment from the employer with the development of unionism and collective bargaining in the country the employers found it necessary and convenient to deal with the representatives of workmen, instead of individual workmen not only for the making or modification of contracts between the matter of taking disciplinary action against one or more workmen but as regards all other disputes.⁶⁷

Therefore, it has been rightly pointed out by the Supreme Court that —

" Having regard to the modern conditions of the society where capital and labour have organised themselves into groups for the purpose of fighting their disputes and settling them on the basis of the theory that 'Union is strength' collective bargaining has come to stay "68

The Industrial Disputes affect not only the worker and the employer but also the society and in turn the government, so in their solution not only the peace in the industry comes but the whole society takes a sigh of relief. As such,

66. *ibid*

67 Ram Prasad Vishwakarma V Industrial Tribunal (1961) 1 LLJ 504 (507) (SC); Kanai Chandra Ganguli V Central Government Industrial Tribunal (1971) Lab IC 560 (590) Pat (DB)

68 D.N.Banerjee V P.R.Mukherjee (1953) 1LLJ 195 (199) also see Gauhati Transport Association V Labour Court (1969) Lab IC 1568 (1570) (Ass & Nag), Newspapers Ltd V Industrial Tribunal (1957) 11 LLJ 1 (6) (SC)

"collective bargaining, being the order of the day in a democratic welfare state, should encourage trade union activities which must shun all kinds of physical threats, coercion or violence. It must march with a spirit of tolerance, understanding and grace in dealing with the disputants. Such activities should foster mutual confidence, Trust and Cooperation between the employer and the employee. It should not be treated as irk some by the employer in the best interest of his business or industry; dialogue with representatives of a union help striking a delicate balance in adjustments and settlement of various contentions, claims and issues." ⁶⁹

7. Collective agreements and their Contractual Efficacy —

It is clearly settled that unions of workers and associations of the Employers can make contracts. The contract of membership which both make is one important example. It had in fact happened in past that Employers Association and Trade Union did give to their agreement that force of contract which may be enforced. The best known examples were the famous terms of settlement in the Boot and Shoe Industry of 1895 in England, drafted by Sir Courtney Boyle, Permanent Secretary of the Board of Trade.

A Position in India :

The collective agreements arrived at in between the workers or their union on one side and the employer or association of employers on the other side, if through direct negotiation between the parties without the intervention of any third party or agencies created in the Industrial Disputes Act, 1947 come into being, such agreement shall be binding between the parties who entered into the contract ⁷⁰ while a settlement arrived at

69. Bharat Iron works v Bhagubhai Balubhai Patel (1976) Lab 1C 4 (SC)

70. See section 18 (1) of the Industrial Dispute Act, 1947.

through the good offices of the conciliation officer has given extended operation. It is binding not only on the parties to the settlement, but is also binding on all the workmen of the establishment, whether such workmen are parties to the settlement or not, on the assumption that the conciliation officer is required to ensure not only that the settlement is voluntary, but also that it is fair and reasonable.⁷¹ Thus in India, the collective agreements statutorily have been given the force of enforceability. The question of acquiescence of workers does not arise.

" when the settlement arrived at between the company and a vast majority of workers is just and fair and also accepted by them in totality, the question of acquiescence does not arise."⁷²

The settlement of labour disputes by direct negotiations or settlement through collective bargaining, is always to be preferred, for as is obvious it is the best guarantee of the industrial peace which is the aim of the legislation for the settlement of labour disputes.⁷³

Thus in India, the collective agreements are legally binding and enforceable as a contract. It is always preferable to incorporate the terms of the collective bargaining agreements in the individual contracts of each worker's service contract. Those

71 Ibid sec 18 (3). See Ram Nagar Cane and Sugar Co V Jatin Chakravarty AIR 1960 SC 1012. Herbertsons Ltd V Workmen AIR 1977 SC 322.

72 M/s Tata Engineering and Locomotive Co Ltd V Their workmen AIR 1981 SC 2163

73 New Standard Engineering Co Ltd V N L. Abhyankar AIR 1978 SC 982.

who are non-members or do not agree with the policy or items of agreements arrived at through the negotiators of collective bargaining agreements, may exclude themselves from the incorporation of collective terms in their individual contracts and remain excluded from the rights and benefits flowing from such agreements, if the scheme of incorporation of terms of collective agreements to individual contract is introduced. But this scheme will be operative only where the agreements are arrived at under section 18 (1) of the Act.

B. Position of England :

In England, as asserted by Sir Freund,

"There was thus nothing in the law itself to explain the fact, that before the Act of 1971 went into operation British Collective Agreements were generally not contracts. This can only be explained by the lack of that intent to conclude a legally binding contract which is an indispensable element of contract making as much as offer and acceptance and consideration. That the intent did not exist and that for the reason collective agreements were not as a rule contracts in the legal sense, was the conclusion of which the Donovan Commission arrived at in its reports."⁷⁴

The collective agreements are not treated as contracts in the strict legal sense because of lack of intention to make a contract and because of lack of privity.

The change in importance of "conduct" as method of establishing terms of the contract is a trend of recent origin. Now the increasing use is being made of the device of explaining the actual conduct of the parties as non-obligatory in character and hence as not giving rise to contractual rights and duties.

⁷⁴ Kahn-Freund, Sir Otto: Labour and The Law (Hamlyn Lecture Series), London, 1977, p 126-27.

In Young V Canadian Northern Railway Co (1930)⁷⁵, the issue was whether a collective agreement concerning the order in which employees would be made redundant was incorporated into the individual contract of employments, the principal ground for holding that the agreement was not so incorporated was that its implementation in fact by the company was not conclusive of its establishing contractual liability because the implementation did not have to be explained in terms of the employers regarding himself as under contractual agreement and obligation

" The fact that the Railway Company applied the agreement to the appellant is equally consistent with the view that it did so, not because it was bound contractually to apply it to him, but because as a matter of policy it deemed expedient to apply it to all."⁷⁶

The result, as desired by the collective agreements, if, are allowed to materialise, it is very difficult to assert that it was because of some policy and not because of collective agreement obligation

In Ford Motor Co Ltd V AUEF⁷⁷ such agreement came to be seen not as a contracts on the civil law sense but as 'Gentlemen's Agreements' which unless the parties specified otherwise were not intended to be legal contracts between employers and unions - a view upheld as the correct approach to collective agreements in the above case In this case, Ford Motor Company failed to obtain an injunction from the High Court against unions allegedly acting in breach of

75 (1931) AC 83 (PC)

76. ibid - p 86

77. Ford Motor Co V Amalgamated Union of Engineering and Foundry Workers (1969) 2 QB 303; See also Stuart V Ministry of Defence (1973) 1RLR 143 (NIRC).

procedures agreed in certain collective agreements, because those agreements were the court held, not intended to be legally binding between the company and the unions Lord Wedderburn observed -

" Ofcourse the terms of the many thousands of British Collective agreements do have some legal effect, that effect is achieved not at the collective level but by their incorporation with each workers individual contract of employment "78

As such, if the collective agreements are to be incorporated in each workers individual contract of employment for giving it legal effects, the point of being a non member worker, of a workers union becomes irrelevant for testing the effect of collective agreements on such workers But if, the collective agreements are regarded as 'policy charger' of the industrialists and they implement certain decisions affecting the employment contract of workers the benefit goes to all and a non member worker also gets the same benefits The non member worker gets the fruits of the bargain as a dole while a member worker gets the fruits as a matter of right

Some Lawyers have pointed out that the theory of implied contract operates in the case of collective bargaining agreements, because both the parties feel bound to observe the terms of such an agreement Breach of the term by either party will lead to shattered industrial peace and understanding - and this becomes the sanction for the observance of the terms of the collective agreements

78 " The New Structure of Labour Law In Britain" Lionel Cohen Lecture delivered on 30th May, 1978 by Lord Wedderburn of Chalton at Hebrew University Jerusalem. (Journal of the Bar Council of India Vol 7(4) 1978 p 38 The Lord has tried to reconcile the matter by Christening and categorising the law as collective - labour law and Industrial Labour Law

AS such, the collective agreements in strict legal sense may not be legally binding but in practice because of sanctions their terms are invariably implemented either as a matter of policy or as a result of the legal obligations which can be ascertained only after a factual enquiry of each case.

8 The Present Position of Collective Bargaining in India :

The Collective Bargaining in India does exist at local level as well as in the shape of centrally organised politically dominated organisations of federative character. The problems of outsider leadership, multiplicity of unions at local level, bloated membership, recognition by the employer and accosting of bargaining agent status to a union are still looming large escaping solutions. Yet, the impact of collective bargaining in doctrinaire and philosophical sense, that is as a matter of principle has been spectacular in India and its imprints are visible in the shape of multiplicity of unions though of weak strength and for political and other ulterior purposes. Day by day, by the expansion of industrial units in public as well as in private sector, the trade unionism is also coming of age and in an industrialist programme of action labour finds a place. Workers-cause has become an item for caress and nurturing, they have become an entity to be taken care of, if the project of industrial production is to get through successfully. From workers point of view it is advisable to have one union in one industry and its leadership from the within as a motto. It is alleged that an outsider leader is more interested in his own policies than the welfare of the workers. It may be true. But it is also true that an organisation of workers may not have, always a

capable leadership Further, the political nexus of an outsider provides protection and a means in fulfilling the over all packages of demands of the workers by patronising the higher political bosses who frame the policies of the country The spurt of social security legislations, may be, for vote - catching device, yet they serve in the long run the interest of the majority of workers The apathy towards an outsider leadership seems misconceived, because an insider office bearer of a union becomes an outsider, the moment, he is dismissed by the management of the establishment. Multiplicity of Unions breeds weak unions serving the ends of the employer giving him an opportunity to divide and rule and as such hurting the cause of workers A responsible leadership of workers union, having the support of majority of the workers so that it may function as a genuine bargaining agent is the cry of the day Too much of agitations, strikes and work stoppages with its cogent methods for achieving the result of collective bargaining or implementation of the doctrine of collective bargaining in its perverted shape is to be discouraged

In a democratic country like India, the place of collective bargaining, where collective will and wisdom is expected to participate, can not be overlooked The ills by which the system suffers can be capitulated because of awareness aroused in workers due to recent educational awakening and the hard experiences of the working conditions and their solutions by means other than the collective bargaining In some regions the long spell of strikes has led to the closure of the establishment itself The number of sick units have enhanced and where the cause was industrial dispute,

the adamant attitude of the parties to the dispute to stick to their demands at the cost of closure is not a healthy trade unionism. Any demand for better conditions has to be linked with productivity. The employers may be justified in rejecting the demands of the workers where the demand is beyond his control or capacity to fulfil. It may be said that the worker is always justified in seeking a better condition of service but where the existence of the concern is at stake, a reasonable trade unionist must agree with the present facilities provided by the employer with an eye for the future.

The workers should feel involved in the concern in which they work. This idea has been translated into action by allowing the participation of workers in managing the affairs of the concern in which they work. This participation of workers in management is the anti-thesis of collective bargaining.

In planned economy, where the development of the country as a whole is aimed within a time schedule, the solutions of industrial disputes by means other than the collective bargaining is resorted to, so that timely solutions without work stoppages may be achieved. In India when negotiations fail, the process of mediation, conciliation, arbitration and adjudication, is no doubt resorted to but at the same time of late, the concept of 'Wage - Boards' in many important industries is also emerging, which is nothing but a result of Bipartite or Tripartite negotiations to clinch the issues—a refined form of collective bargaining.

CHAPTER - VI

INTERNATIONAL LABOUR ORGANISATION (ILO)
AND THE LAW OF INDUSTRIAL EMPLOYMENT IN
INDIA

A. International Labour Organization - Establishment and Function

Origin of International Labour Organisation may be attributed to the pioneer thinking of reforms¹, reconstructing needs of peace and development after the I world war (1914-18) and to relieve the workers world over from the exploitations caused to them because of the industrial revolution. The Industrial Revolution in European Countries brought in many new consumer products for use through the system of mass production in factories. The social set up on agrarian base transformed to industrial base making workers a central factor of production. The cultural approach and social philosophy regarding the working class and their own outlook also changed because of efforts of reformers like Robert Owen² in the over all social frame work of eighteenth century society where working class was no more than a saleable commodity. In those days, the extent of production and profit of the employer bore a direct bearing on the extent of exploitation of the working people. Every right thinking man amongst the masses was realising that there should be some reform, some curb, some amelioration and some change in the then state of working class. This groping for reform continued nearly for a

1. Jerome Adolphe Blanqui (1789-1854) a french sociologist revived the efforts for international action once initiated by Robert Owen. Daniel Le Grand (1783-1859), a French manufacturer an ardent supporter of labour reforms. Karl Marx and Friedrich Engels inspired; "workers of the world, unite" ("ILO in the service of social progress" ILO (Geneva) 1969 p 21,30)
2. Robert Owen (1771-1858) A Briton humanist industrialist who founded an industrial Township NEW LANARK where in shorter working hours, improved condition for work Entertainment, education of the children of the workers and cooperative societies and marketing was introduced ("ILO and India in pursuit of social justice" - S N Dhyani, 1977, p 4)

century and ultimately the International Labour Organization was established in the year 1919, with a scroll on the foundation stone of head quarter building of ILO in Geneva, which reads :

" If you wish peace, cultivate Justice"

There can be no peace without social justice, a social justice rooted in that order within which men live, work and have their being ³ Behind the establishment of ILO, there was a cumulative effect of many an international conferences, efforts of the working class itself and the political consciousness of freedom and democratic way of life

Some of the Important Conferences -

The First International Labour Conference was convened in Berlin in the year 1891 In 1900, a voluntary organization called, 'The International Association for labour legislation' held its first conference The Association was composed of autonomous national sections and was financed by voluntary contributions from Governments and individuals ⁴

In 1905 and 1906, two more conferences were convened at Berne by the Swiss Government at the instance of the International Association for Labour Legislation Two important conventions were approved at the Berne Conference - The first, prohibiting the use of white phosphorous, and the second prohibiting night work for

3. "The ILO in the Service of Social Progress", ILO (Geneva) (1969) p 2.

4 'India and International Labour Organisation - Fifty years in Retrospect' (Government of India, Deptt of Labour and Employment, 1969) p.2.

women This may be said a definite starting point for a regular International Labour Organisation

During the first world war, the labour welfare activities were suspended but as the war was nearing its close, there was a general feeling that the labour should have a distinct place in the peace - treaty while the peace talks were in progress the Paris peace conference appointed a commission on International Labour Legislation on 31st January 1919 The Commission was

"to enquire into conditions of employment from the international aspect and to consider the international means necessary to secure common action on matters affecting conditions of employment, and to recommend the form of a permanent agency to continue such enquiry and consideration in cooperation with and under the direction of the League of Nations "5

It was composed of the five great powers of the Peace Conference - The U.S.A., U K France, Italy and Japan and representatives of Belgium Czechoslovakia, Cuba and Poland. Its chairman was Samuel Gompers President of the American Federation of Labour, and The Right Honourable G.N.Barnes and Mr Colliard were the two Vice-Chairmen It was this commission which framed the constitution of the International Labour Organization This was adopted on 11th April, 1919 and later embodied as part XIII in the Treaty of Versailles

The present I L O has been influenced by the second world war (1939-44), so far as its objects are concerned In 1944, the Philadelphia session of the International Labour Organization laid

5 Johnston G.A. : "The International Labour Organization", (1973) p 12

down two basic principles First, it may be the central aim of national and international policy to achieve such conditions as would enable all human beings to pursue their material well being and their spiritual development in conditions of freedom and dignity, of economic security, and, secondly all national and international efforts should be judged in the light of this aim

Thus the original constitution of I L O was amended in 1946 incorporating the Philadelphia Declaration which reaffirmed the fundamental principles on which the ILO is based The original constitution of the ILO sought to redress only the sufferings of labour through the instruments of conventions and Recommendations. The amended constitution provides in its ambit ensuring of adequate living wage, social security and the right of freedom of association besides improving of the condition of labour It also provides such measures as vocational training and technical education which sharpen the workers personality and skill Thus the ILO was enabled after 1946 to undertake a wide range of functions covering not only

" conditions of labour but also embracing several aspects of labour welfare and Industrial relations "6

The functions of the ILO can be summed up in two words : Legislation and information ⁷ This signifies formulations of international labour standards as the main purpose of ILO

The ILO created as a part of the League of Nations is an association of Nations financed by the member nations themselves

6 Bhir, B.S A Survey in ed Dimensions of Industrial Relations in India (Bombay 1970) p 29.

7 Supra Note 5 p 88

One of the unique features of the ILO is its tripartite structure, i.e. it is composed of three groups - representatives of the Government the workers and the employers. All the three groups have a share in controlling it in shaping its policies, working out its programmes and supervising their executions.

India's Membership of the ILO :

India has been a member of the ILO since its inception in 1919 and have had a close and active relationship. India is founding member state of the ILO, though India was not fully independent yet it was admitted with in the fold of the organization. However, its membership of the league of Nations and the ILO had not gone unchallenged, on the basis that it would give an additional vote to the United Kingdom.⁸ The British Government had to give an assurance that British India was 'democratically administered' and upon this India alongwith China, Iran, Japan and Thailand were the few Asian Countries to be admitted to the ILO membership.⁹

India has been a member of the ILO's Governing body since 1921 by virtue of the country being one of the ten "Countries of chief industrial importance". India is also a member of the 14 standing committees. Indian representatives of workers and employers organizations have also been regularly elected to the Governing Body.

Indian participation in the deliberations of the ILO is not confined to the theoretical level only but Indian approach has been practical also. The objectives and principles enunciated by the ILO

8 Amir Ali Fifty years of the ILO and Asia International Labour Review vol 996 (1969) p 348

9 ibid

have been given a practical shape by the Indian actions while enshrining the concept of fundamental rights in its constitution India has incorporated the objectives of the ILO's fundamental rights of citizens making exploitation through forced labour, child labour and traffic in human beings as violation of fundamental rights

In pursuance of its deep commitment against Apartheid, the Government of India has offered training facilities in India to members of the Liberation Movements of Africa and the front line states To fulfil this commitment the Indian Government has contributed £ 100,000 for a period of four years to facilitate the training programmes in the field of Industrial Vocational Training, Hotel management and secretarial training covering communication modes as well ^{9a}

In Nov , 1928 the ILO established a Branch Office in New Delhi to serve as a link with its head quarters at Geneva and Indian workers Employers and the Government The concept of Tripartism in India with regard to labour policy, labour legislation labour administration and industrial relations completely bears the impact of and is closely modelled on the Tripartite structure of the ILO No doubt inspired by the Tripartism of the ILO The Royal Commission in India recommended in 1931 the creation of a machinery of the national level with a view to framing rules and regulations for the application of labour legislation and formulation of legislative policy

^{9a} ILO, The ILO and Africa, 44 (1966)

Tripartism has further percolated in Indian Labour relations on the model of ILO'S Industrial Committees and a number of Industrial Tripartite committees in the field of Plantations, Chemicals and other industries have been established Tripartism is followed in all the statutory bodies constituted by the Ministry of Labour, Government of India ¹⁰ Similar committees with tripartism have been established by various State Governments also

For ratifying the conventions of the ILO a Tripartite Committee has been set up having a participation of representatives of employers and the workers under the Chairmanship of the Secretary, Ministry of Labour, Government of India

Objectives of the ILO :

" AS a light house throws its beam abroad into the darkness searching out and illuminating obscure and hidden places so does the ILO serve to explore and discover those parts of the earth where men work in hardship and privation, awaiting the day when principles of justice and humanity shall reign "11

In practice, the fact is that the ILO reaches right through the national or industrial framework to the individual worker at his work place Through various entities and channels, national or occupational the work of ILO affects the productivity capacity and conditions of life and labour of all who till the soil, turn raw materials into finished goods, drive machines or render

10 Minimum Wage Control Advisory Board, Advisory Committee (Dock workers) and Dock Labour Boards Central Boards of Trustees of the Provident Fund Scheme The Advisory Committees for Coal and Mica Mines Labour welfare Fund and the Central Board for workers Education, etc all have tripartite structure

11. "Labour Faces the New Age," A workers Education Manual, ILO (Geneva) 1965, p 81

services ¹² Thus ideals do not remain ideals but actually are practised and given a proper shape. It also proves that ILO is an important humanitarian institution set up to protect the interests primarily of the workers of the world.

The preamble of the constitution of ILO is almost entirely devoted to highlight the objectives of ILO. As per preamble, the main objectives of the ILO are :

- i) Improvement of conditions of work
- ii) Regulation of the hours of work, including day and week
- iii) Regulation of the labour supply
- iv) The prevention of unemployment ;
- v) To provide adequate living wage ,
- vi) To protect the workers against sickness, disease and injury arising out of his employment
- vii) To protect the interest of workers employed in countries other than their own ;
- viii) Recognition of the principle of equal remuneration for work of equal value ;
- ix) Recognition of the principle of freedom of association

These objectives reflect the sentiment of justice and humanity, by which the High Contracting Parties were moved to agree to the formation of ILO. These objectives aim to achieve social justice, which the preamble of the constitution of ILO, declares to be the very basis of universal and lasting peace in the world.

12. " The ILO in the Service of Social Progress", ILO (Geneva) (1969) p 1

The Philadelphia declaration of the International Labour Conference of ILO on 10th May, 1944, formed the basis of the amendment of the ILO constitution in 1946

It reaffirmed that —

- a) Labour is not a commodity
- b) freedom of expression and of association are essential to sustained progress
- c) poverty anywhere constitutes a danger to prosperity everywhere
- d) the war against want requires to be carried on with unrelenting vigour, and by continuous and concerted international effort in which the representatives of workers and employers enjoying equal status with those of governments join with them in free discussion and democratic decision with a view to the promotion of the common welfare

Believing that experience has fully demonstrated the 'Truth' of the statement in the constitution of the ILO that lasting peace can be established only if it is based on social justice the declaration affirmed that —

- " all human beings irrespective of race, creed or sex have the right to pursue both their material well being and their spiritual development in conditions of freedom and dignity of economic security and equal opportunity "

The declaration recognised the solemn obligation of the ILO to further among the nations of the world programmes which world achieve —

- a) full employment and the raising of standard of living
- b) the employment of workers in the occupation in which they can have the satisfaction of giving the fullest

measure of their skill and attainment and make their greatest contribution to the common well being

- c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned of facilities for training and the transfer of labour, including migration for employment and settlement ;
- d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection ,
- e) The effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency and the collaboration of workers and employers in the preparation and application of social and economic measures
- f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care
- g) adequate protection for the life and health of workers in all occupations
- h) provision for child welfare and maternity protection
- i) provision of adequate nutrition, housing and facilities for recreation and culture and
- j) the assurance of equality of educational and vocational opportunity.

This declaration further affirmed that —

" The principles set forth in the Declaration are fully applicable to all people everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to people who are still dependent, as well as to those who have already achieved self government is a matter of concern to the whole civilized world "13

After specifying the above objectives, the Declaration pledges the ILO's cooperation with other organisations which share the responsibility for pursuing the goals of ILO. Thus the Declaration of Philadelphia, redefined the fundamental aims and purpose of the organisation in the light of the needs of a new post war era

ILO and its relevance to Industrial Employment Contract in India

The impact of industrial revolution in India was realised nearly after one hundred years of its impact on European Countries. The mass production in factory system began in India also and all those elements began to centralise which set a capitalist economy in motion where profit making is the sole aim of the capitalist. In that system the labour is treated simply as a factor of production - an element and item of cost. The human aspect of the working class is ignored. The employer is interested in extracting the maximum work from the workers at the lowest cost. The welfare, Living wage, Hours of work, Rest, Night work by the women and children, Minimum Wages, social security, Maternity protection, collective bargaining, Right to form associations, workers participation in management, safety measures, Reasonable conditions of working with atleast adequate

13. Philadelphia Declaration, 1944 Article V.

light and ventilation, overtime payment, payment of Bonus, Gratuity, Pension Provident Fund etc were the concepts which were unknown in the capitalists plan of action The India was British India - a colony of Britishers The Industrialists, Planters and Factory owners were also Britishers in majority So their main aim was to earn profits and perpetuate the British Raj by making India a source of raw materials and a big and a ready market for their finished goods

The foundation of ILO in 1919 was a great event for India, because, virtually upto that time there was no legal base for pursuing the bonafide trade union activities at different industrial centres in India The awakening, the conceptual formulations and the world wide support of the causes of working class spearheaded the activities of the working people in India in legislative, judicial and practical trade union activities with success The awakening that the working class is not a commodity but a human being just like those who are owners, capitalists, employers, managers and entrepreneurs led them to realise that unity and concerted action may be an answer to the dictates of the exploitations committed over the workers by the employers The unity of workers their strikes and their just demands forced the then Government also to think that Government is meant to keep peace, law and order and its action must cover not only the interests of the capitalists but also the interests of the workers and more so the interest of the society as a whole As a result of

all this, the legislations¹⁴ covering the needs and demands of the working class were passed, many of them had their origin conceptually in the conventions and the Recommendations of the ILO

The British India was one of the founder members of the ILO and happened to be a permanent member of the governing body since 1922 as a result of the declaration that British India was one of the ten states of Chief Industrial importance. As such the concept of 'tripartism' in solving problems concerning the working class has been the sole guiding principle. Moreover the social justice, world-peace etc were so propogated and understood that the proper role and place of working class could not be ignored, irrespective of the system of governance at a particular country. The struggle for independence and the role played in that struggle by the working class cannot be overlooked in case of India. The zeal, the motto and the modusoperendi percolated from the ideals of the ILO. Even after Independence i.e. 1947 -The ILO has not been irrelevant. Prohibition of bonded labour, care of migrant labour, equal pay for equal work etc have found their place not only in the Indian Constitution either as a fundamental right or as a directive principles of state policy but have seen the light of the day as a

14 The workmens Compensation Act, 1923 The Trade Union Act, 1926 Payment of Wages Act, 1936 The Industrial Employment (Standing Orders) Act, 1946 The Industrial Disputes Act 1947 The Minimum wages Act 1948 were the main legislative support to the working class. Though the Children (pledging of Labour) Act, 1933 The Employers Liability, Act, 1938 and weekly Holiday Act, 1942 were some other supporting pieces of legislation

distinct statutes also ¹⁵

The Payment of Bonus is now controlled through legislation not through the whims of the employer. The participation of workers in management, the democratic collective bargaining, the worker's education, the responsible trade unionism etc. are the new developments brought about by the deliberations of the ILO which at least surely meets once in a year with delegates from the world over.

The Indian Labour Conference ¹⁶, the different wage awards in different industries, the evolution of code of Discipline for employers and workers alike, reference of disputes where collective bargaining, reconciliation, arbitration etc. fail by the Government for adjudication or where Government feels an early solution is necessary, the reference to adjudication may be made at first hand without testing the efficacy of other means of solving the disputes. All these developments are due to the awakening inculcated by the propaganda machinery of the ILO and its other constructive activities like training programme, technical aid and cooperation for the development of human resources.

This shows the relevancy of the ILO to the cause of working classes all over the world and India is no exception. The

15 Tea Districts Emigrant Labour Act 1932 merged to the Plantation Act, 1952 Maternity Benefit Act, 1961 The payment of Bonus Act, 1965 The Contract Labour (Regulation and Abolition) Act, 1970 The Gratuity Act, 1972 The Payment of Bonus (Amendment) Act 1972 Kerala Agricultural Labour (Migrant) Act, 1973, The Bonded Labour System (Abolition) Act, 1976 Equal Remuneration Act 1976 Emigrant workers (Regulation & condition of service) Act 1979 Employment of children (Prohibition and Regulation) Act, 1986 etc

16 Established in 1942 aims of Uniformity in Labour Legislation

standardization in working conditions so that uniformity of treatment is ensured, has come, because of the ILO. The beginning from minimum wages to fair wages and then to living wages was the most important agenda of consensus which we find in between the employers and the working class because of the reality understood by all the parties due to the constant deliberations of the ILO.

The important elements of a contract of employment happen to be the working conditions of the workers, their wages and other benefits and perquisites which they must be allowed while they are actively in employment and after their employment is over i.e. when they have retired from active service. These agenda of social securities got their origin first conceptually and then in real practice because of the awakening, thinking and standardizations preached by the ILO. Thus the relevance of the ILO to the contract of employment in any country of the world is quite efficacious and India is also one of the beneficiaries. The ILO and its conventions provided jurial base and philosophical ideas to the post-independent labour management relationship and thereby contributed to the welfare of the Indian Labour.¹⁷

D ILO Standards relevant to Indian Industrial Employment :

The ILO tries to achieve its objectives through formulations of standards by means of conventions, Recommendations and Resolutions so that a uniform behaviour is meted out to the workers world-over. The conventions and Recommendations adopted by the conference provide

¹⁷ Justice Gulab Gupta - Our Industrial Jurisprudence, CILIL, Jabalpur 1987 p 30.

a means of Translating the constitutional objectives into more specific rules and guidelines ^{17a} ILO member states have recognised the role which ILO standards can play as a means of ensuring balanced economic and social development and in securing recognition of the need for improved living and working conditions both as a contributing factor to and as the ultimate purpose of economic development ¹⁸ In its standard setting activities the ILO has endeavoured to build in successive stages a solidly based structure capable of giving concrete results ¹⁹ The international standards established by the ILO are set forth in a large number of conventions and recommendations ²⁰ These standards have not been established as an abstract ideal towards which national activities should be directed On the contrary they are as a rule recognised minimum standards so that their implementation should be feasible even in less developed countries ²¹

The ILO has three main organs —

- a) The International Labour Conference ;
- b) The Governing Body and
- c) The International Labour Office, controlled by the Governing body ²²

17a Labour Administration Training Material, selected International Labour Conventions and Recommendations (Vol 2) ILO-Asian and Pacific Project for Labour Administration (APPLA) Bangkok, 1985 - p 137

18 Johnstone, G.A "International Labour Organisation" (1973) p.88

19 "The ILO in changing world" International Labour Office, Geneva (1958) p 6

20 "The ILO and Human Rights" International Labour Office Geneva (1968) p 1

21 "Labour Faces the New Age " International Labour Office Geneva (1965) p 105

22 Article 2 Constitution of the ILO

Among these organs, the conference acts as the Supreme Legislative organ of the organisation, Governing Body as its executive council and the International Labour Office as the Secretariat operational head quarter and a store house of informations. The work of the conference and the governing body is supplemented by that of Regional Conference and Committees Industrial Committees and analogous bodies, committees of experts, Panel of consultants and other special conferences held from time to time.

The proposals of the International Labour Conference may take the form either of a convention or a Recommendation. A convention is a treaty or agreement which if ratified creates binding international obligations for the country concerned. On the other hand a 'Recommendation' creates no such obligations but is essentially a guide to national action and may be implemented in parts and to the extent possible.²³ The difference between the two may be in brief described as - Conventions are agreements designed for ratification which are binding on the states that have ratified them. The ratifying state undertakes that its legislation and national policy will be brought into line with the standards laid down in the convention concerned.²⁴

A Recommendation is not binding in the same sense as a convention, Recommendations are essentially guides to national action without creation of the international obligation.²⁵

23 See Supra Note 2 p 93.

24 "The ILO in the Service of Social Progress", International Labour Office Geneva (1969) p 100

25 Ibid

Another form of the expression of the will of the International Labour Conference is a Resolution. This is intended to draw attention to an issue which may be the subject of a future convention or recommendation. Resolutions play a secondary role and do not create any legal obligation for the member states.

Even though the conventions gain the force of law only on ratification, the fact that they are formulated for domestic application on the basis of consensus arrived at on an international plan, despite the differences in the economic, social and political systems of its members, must be construed as a unique contribution of the ILO.²⁶

The various conventions and Recommendations adopted by the ILO may be categorised and summarised under the following heads -

- I ILO standards and the Indian Constitution
- II ILO standards and right to Association
- III ILO standards and working conditions of the workers
- IV ILO standards and wages
- V ILO standards and social security
- VI ILO standards and forced labour
- VII ILO standards and women workers
- VIII ILO standards and child labour

I ILO Standards and the Indian Constitution :

" we the people of India resolved to constitute India with a sovereign socialist secular democratic republic adopt enact and give to ourselves this constitution"

are not only the important part of the preamble of our constitution, but also mark the beginning of the era of a new constitutional culture in India ²⁷ In 1950 India became a sovereign Democratic Republic and a constitution was adopted which became sovereign law of the land ²⁸ It is interesting to note that there is a remarkable similarity between the preamble of the Indian Constitution and the ILO when read with the Declaration concerning the aims and purposes of ILO adopted to Twenty sixth session of the International Labour Conference at Philadelphia popularly known as the Philadelphia charter of 1944 ²⁹ For instance, the expression, 'Labour is not a Commodity' of the ILO constitution can be equated to dignity of individual 'in the preamble of Indian constitution 'Freedom of Expression and Association' of ILO with 'Liberty of thought and expression also freedom of association' etc of the Indian Constitution convey the same meaning Similarly the right of all human beings irrespective of race creed and sex to pursue their natural well being of the ILO can be equated with 'equality of status and opportunity' and 'Liberty of faith and belief' of Indian Constitution The similarity becomes even more striking when the Indian constitution lays down in greater detail what it calls the Fundamental Rights and Directive Principles of State Policy ³⁰

27 Justice Gulab Gupta 'We, The People of India' 1988 (1) CILQ p 359.

28 Dr Srivastava Suresh C 'Industrial Relations Machinery' (1983) p 18

29 Sharma G S Trade Union Freedoms in India (1990) p 108

30 Ibid

With regard to the influence of ILO on the Indian Constitution the Report of the committee on Labour welfare (1969) observes —

" With a clear guidance of what should normally be provided under welfare amenities to workers, from this highest organisation of labour in the world the framers of the Indian Constitution also paid due attention to the amelioration of working classes of the country "31

Thus the Indian Constitution has made a specific mention of the duties that the state owe to the labour to their economic upliftment and social regeneration ³²

II ILO Standards and Right to Association :

"Freedom of Association is one of the foundations on which we build our free nations" Thus asserted Sir Abubakar Tafawa Badewa the then Prime Minister of Nigeria, while opening the first ILO African Regional Conference in Lagos in 1960 ³³ Preamble of the constitution of the ILO expressly recognises the principle of freedom of association as one of the means of improving the conditions of the workers and establishing universal peace

In the beginning of industrial revolution, the concept of 'freedom of contract' and inaction of the state on the basis of supposing workers and employers on equal footing and market forces to be the deciding factor of workers well being, led, in fact, the employers to command an unfettered right to run their business. The idea of workers participation in the management was alien to them. 'Freedom of Association' in the same manner was not a right

31 " Report on Labour welfare -1969" - Government of India Publication p 10

32 See Article 19 (1) (c), 39,41,43,43A etc.

33 Supra Note 2 p 90.

of the workers ³⁴ Combination Acts of 1799 and 1800, declared association of workers in any form, an illegal act giving a protection and freedom to the employer regarding his business activities. The century long struggle of workers led to the establishment of ILO in 1919 and trade union flourished only after 1919. The right of association to unorganised sector on priority basis was given by the ILO on the assumption that workers are on the path of organising themselves by its Right of Association (Agriculture) convention 1921. In the year, ILC adopted Freedom of Association and Protection of the Right to organise convention 1948, though in 1944, the Declaration of Philadelphia had already declared that "freedom of expression and of association are essential to sustained progress" ³⁵

The Freedom of Association and Protection of the Right to organise adopted in 1948 came into force on July, 4 1950. Article 2 of this convention provides :

" workers and employers without distinction whatsoever shall have the right to establish and subject only to the rules of the organisation concerned ~~to join organisations~~ ~~concerned~~ to join organisations of their own choosing without previous authorisation "

Article 11 of this convention also provides that -

"Each Member of the International Labour Organisation for which this convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise "

34 Varadani Gursharan "Workers Participation in Management" (1989) p 11

35 Philadelphia Declaration, 1944, part I (b)

The Collective Bargaining convention - 1981 has also been enforced to give a fillip to democratic collective bargaining in industries

III ILO Standards and working Conditions of the workers including their occupational safety :

Healthy working conditions refer to such working conditions which promote the physical, psychological and general well being of the workers. From the very start the organisation has occupied itself with the safety and health of the industrial worker³⁶. Through its Recommendations, the ILO has tried to take care of workers health and safety, and in 1919 itself the ILC had adopted a Recommendation for the setting up of government services to safeguard the general health of workers suggesting further that these services should keep in touch with the organisation³⁷. ILC made the following Recommendations to ensure healthy conditions of work —

- 1) Anthrax Prevention Recommendation, 1919
- 2) Lead Poisoning (women and Children) Recommendation 1919
- 3) Labour Inspection (Health Services) Recommendation, 1919
- 4) White Phosphorus Recommendation, 1919
- 5) Prevention of Industrial Accidents Recommendation, 1929

International Labour Conference adopted a convention in 1921 prohibiting the use of white lead in paint³⁸. Thus

36 Subra Note 5 - p 116

37 Ibid

38 White lead (Painting) Convention 1921

occupational safety and health have been drawing the attention of ILO constantly since its inception. Recently General Conference has adopted safety and health in construction convention, 1988. In 1981, a convention concerning occupational safety and health and the working environment, was adopted. This convention defined

"health in relation to work indicates not merely the absence of disease or infirmity. It also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work" 39

This convention laid down the principles of occupational safety and health to be followed as Principles of National Policy by the members states 40

Other ILO standard for the safety and welfare of labour pertaining to industries in the form of conventions may be enumerated as below —

- I Hours of work (industry) convention 1919
- II Weekly Rest (Industry) Convention, 1921
- III Workmen's Compensation (occupational diseases) Convention (Revised) 1934
- IV Forty Hour week Convention, 1947
- V Holiday with pay convention - 1936
- VI Reduction of Hours of work (Textiles) Convention 1937
- VII Medical Examination of Young Persons (Industry) Convention, 1946
- VIII Occupational Health Services Convention, 1985

39 Occupational Safety and Health Convention 1981

40 Ibid Article 4

- IX Employment Promotion and Protection against unemployment convention, 1988
- X Safety in the use of chemicals convention, 1990
- XI Night work convention 1990

IV ILO Standards and Wages ;

The classical system allows for a wage which is equal to the minimum subsistence of the labourers - this being defined as a rate that would maintain the labourer and perpetuate his race.⁴¹ Thus minimum wage should ensure not only the subsistence of the labourer but of his family also To give this concept a shape ILC adopted 'Minimum Wage Fixing Machinery Convention 1928' in the year 1928 Article 1 of this Convention provides —

" Each member of the ILO which ratifies this convention undertakes to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of the trades or parts of the trades (as in particular in home working trades) in which no arrangement exists for the effective regulation of wages by collective agreements or otherwise and wages are exceptionally low "

The same Convention provided that minimum rates of wages which had been fixed would be binding on the employer and workers concerned ⁴² workers who were to be denied such minimum wages were also made entitled to recover such wages by judicial orders,⁴³ by following proper course of action

41 Aziz Abdul, "Labour Problems of a Developing Country" (1984) p 98

42 Minimum Wage Fixing Machinery Convention', 1928 Art 3 (2) (3)

43 ibid Article 4 (1)

The Protection of Wages Convention - 1949 passed in the year 1949 also ensures protection of wages. It provided for the regular payment of the wages to the workers⁴⁴. It ~~is~~ further provides -

" wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family "45

Other important ILO conventions concerning the wages of the workers in industrial employment, are as follows -

- 1) Equal Remuneration Convention 1951
- 2) Minimum Wage Fixing Convention, 1970 (This convention was passed in view of the problems faced by the developing countries)

V ILO Standards and Social Security

As the pace of industrialisation quickened, a large new class of Factory workers emerged, completely dependent for their livelihood on the regular payment of wages. They could well be reduced to privation if and when their wages stopped during sickness and unemployment following work injury or old age⁴⁶. Social security system has been evolved as an attempt to protect the labouring classes from such destitution. As matter of fact, 'Social security' today is a socio economic demand of every society irrespective of its political creed⁴⁷. Soon after its inception the

44 The Protection of Wages Convention, 1949 - Article 12

45 ibid Art - 2.

46 "Introduction to social security" - International Labour Office, Geneva (1984) p 2.

47 Dr Gupta N.H. "Social Security Legislation for labour in India" (1986) p 26

concept of compensation as a social security measure was adopted by the ILO in the year 1921 to the agricultural labour and not to the industrial labour ⁴⁸ The personal injuries arising out of and in the course of their employment were to be compensated After this, ILO passed several other Recommendations and conventions providing social security to workers In the year 1925, workmen's compensation (Accident) convention 1925 and workmen's compensation (occupational diseases) convention 1925 were passed by the ILO

Other conventions concerning the industrial workers social security which were adopted during the early era of ILO were as follows —

- I Old Age Insurance (Industry etc) Convention, 1933
- II Invalidity Insurance (Industry etc) Convention, 1933
- III Survivors Insurance (Industry etc) Convention, 1933
- IV workmens Compensation (Occupational diseases) Convention (Revised) 1934

The land mark convention viz social security (Minimum standards) convention No 102, 1952 was adopted by the ILO on 28th June, 1952

" This brought together in one comprehensive document the policies to which the then member states were prepared to subscribe, and define the range of benefits which form the core of social security "49

This convention marks its authority as setting important basic standards even though in the meantime, the ILO has moved on to a series of more detailed conventions on specific branches of

48 See workmen's compensation (Agriculture) Convention, 1921

49 ~~See workmen's compensation (Agriculture) Convention, 1921~~
 2. In fact social security ILO includes - 284 p 8

security ⁵⁰ Such conventions alongwith Recommendations are listed below which pertain to industrial workers —

- I Social Security (Minimum Standards) Convention, 1952, (No 102)
- II Equality of Treatment (Social Security) Convention, 1962 No (118) (barring discrimination between nationals and non-nationals)
- III. Employment Injury Benefits Conventions 1964 (No 121)
- IV Employment Injury Benefits Recommendation (1964 (No 121)
- V Invalidity, old age and survivors Benefits Convention 1967 (No 128)
- VI Invalidity old age and survivors Benefits Recommendation 1967 (No 131)
- VII Medical care and sickness Benefits Convention, 1969, (No 130)
- VIII Medical Care and sickness Benefits Recommendation 1969 (No 134)
- IX Older workers Recommendation 1980 (No 162)
- X Maintenance of Social Security Rights Convention, 1982 (No 157)

The question of compensation in cases of personal accidents resulting in injury or death is a topic of profound and daily mounting importance ⁵¹ Our technical advancement in many spheres, bringing benefits of various kinds, takes a heavy toll in human life and limb ⁵² ILO pledges to extend the social security measures

50 ibid

51 'Conference on the Reform of the Indian Legal System' 1983, working paper Indian Law Institute, New Delhi, p 1.

52 ibid

to provide a basic income to all in need of such protection and comprehensive medical care ⁵³ International standards set by ILO in the form of conventions and Recommendations is a sincere effort by ILO to strengthen the social security system to promote a chance for workers to live a better life

VI ILO Standards and forced Labour :

The ILO has long been striving to promote an improvement in the conditions of work and life of workers and their families in order to attain a level as close as possible to that consistent with human dignity ⁵⁴ 'Labour is not a commodity' ⁵⁵ proclaimed the Declaration of Philadelphia Bonded Labour the civilized form of Slavery, on the other hand deprives the worker a basic human rights

The Forced Labour Convention 1930 (No 29) was the first instrument in which

" which the ILO endeavoured to lay down a set of standards for the protection of fundamental human right and it is also the instrument which obtained the largest number of ratifications " ⁵⁶

According to this convention term

" forced or contemporary labour" means
" all work of service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily " ⁵⁷

53 Philadelphia Declaration , 1944, Part III (f)

54 "The ILO and Human Rights - Report of the Director General (Part I) to the International Labour Conference Fifty Second session 1968, International Labour Office Geneva 1968 p 95

55 Philadelphia Declaration, 1944 Part I (a)

56 Supra Note 54 p 41

57 "Forced Labour Convention 1930" (No 29) Article 2 (1)

After the World War II the problem of forced labour, drew the attention of ILO once again. An Adhoc Committee on forced labour was constituted by the then Director-General of ILO in June 1951. Sir Ramaswami Muculiar of India was appointed the chairman of this committee. The report of this committee after thorough deliberations led the ILC to adopt another convention No 105, namely the "Abolition of Forced Labour Convention, 1957" which came into force from January 17 1959. This convention is supplementary to convention on Forced Labour (No 29) adopted in 1930.

VII ILO Standards and Women Workers :

Participation of women in socio-economic activity is prevalent in all the countries whether developed or developing. The locational shift of the place of women from total devotion to the traditional home to the work place outside the home has made women an important part of the work force of any nation.⁵⁸ The ILO was quite aware of the importance of the women workers and its very first session adopted the Maternity Benefit Convention 1919 and Night Work (Women) Convention, 1919.

The Maternity Benefit Convention 1919, defined "women" as any female person irrespective of age or nationality, whether married or unmarried,⁵⁹ and the term "child" was defined as 'any child whether legitimate or illegitimate'.⁶⁰ Article 3 (a) of this convention provided that a woman shall not be permitted to work during the six week following her confinement. Similarly, a right

58 Indian Labour Year Book 1983, p 24

59 Maternity Benefit Convention, 1919 Article 2

60 ibid

under the convention is given to a women worker for leave if she produces a medical certificate stating that her confinement will probably take place within six weeks.⁶¹ As a security to the employment of a women worker Article 4 of this convention provides

" it shall not be lawful until her absence shall have exceeded a maximum period to be fixed by the competent authority in each country for her employer to give her notice of dismissal during such absence, not to give her notice of dismissal at such time that the notice would expire during such absence."

The Night work (women) convention 1919 defines night as

a period of at least eleven consecutive hours, including the interval between ten O'clock in the evening and five O'clock in the morning.⁶² This convention provided that "women without distinction of age shall not be employed during the night in any public or private industrial undertaking or in any branch thereof, other than an undertaking in which only members of the same family are employed."⁶³

Again ILO adopted Night work (women) convention (Revised) 1934 in the same year to enhance the coverage of the convention barring work by women

women's role in development has been of considerable interest and a subject of frequent focus in socio-economic research in recent years.⁶⁴ But it has also been observed that —

"There are practices of both concealed and overt discriminations against women. Concealed wage discrimination as a result of systematic relegation of women to low paid jobs in the hierarchy of each profession and overt discrimination in the sense of under payment of women for the same job as held by men."⁶⁵

61 Ibid Article 3 (b)

62 Night work (women) Convention 1919 Article 2

63 Ibid Article 3

64 Economic Bulletin for Asia and The Pacific vol XXIX No 2 June 1983 United Nations p 43

65 Ibid p 40

To ensure women's pay equal to that of men for the same piece of work, ILC adopted Equal Remuneration Convention, 1951. For this Convention

" 'remuneration' includes the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly whether in cash or in kind by the employer to the worker and arising out of the worker's employment"⁶⁶

whereas the term

" equal remuneration for men and women workers for work of equal value"

refers to rates of remuneration established without discrimination based on sex ⁶⁷

VIII ILO Standard and Child Labour :

The social evil of child labour has spread throughout the world with the spread of modern industrialisation. Though child labour has existed in some form or the other from the very early time when children were required to work in the homes or in the field, it was not before the industrial revolution in England that the evil effects of child labour became acute and attracted attention ⁶⁸. In the very first session of ILO in 1919 it adopted a convention concerning the minimum age for employment in industry ⁶⁹ to curb the abuse of child labour. Article 2 of this convention provided that —

" Children under the age of fourteen years shall not be employed or work in any public or private industrial undertaking or in any branch thereof, other than an undertaking in which only members of the same family are employed"

66 "Equal Remuneration Convention" 1951 Art 1 (a)

67 ibid Article 1 (b)

68 Giri V V "Labour Problems in Indian Industry" 1972 p 394

69 Minimum Age (Industry Convention), 1919

In order to facilitate the enforcement of this convention every employer in an undertaking is required to keep a register of all persons under the age of sixteen years employed by him and of the dates of their births ⁷⁰ The age of 14 was fixed under this convention considering the school leaving age of children in many countries because no school attendance was compulsory beyond the age of 14

Another convention ⁷¹ concerning the night work of young persons employed in Industries was also adopted in 1919 According to Article 2 of this convention young persons under eighteen years of age are not to be employed during the night in any public or private industrial undertaking or any branch thereof, other than an undertaking in which only members of the same family are employed *

" For the purpose of this convention the term 'night' signifies a period of at least eleven consecutive hours including the interval between Ten O'Clock in the evening and Five O'clock in the morning " ⁷²

However "in the application of this convention to India the term "industrial undertaking" shall include only "factories" as defined in the Indian Factories Act, and Article 2 shall not apply to male young persons over fourteen years of age " ⁷³ Similarly Article 7 of this convention provides for the prohibition of night work suspended by the Government for young persons between the ages of

70 Ibid Article 4

71 Night work of Young Persons (Industry) Convention, 1919

72 Ibid Article 3 (1)

73 Ibid Article 6.

sixteen and eighteen years when in cases of serious emergency the public interest demands it. Thus considering the night work as prejudicial to the health of young persons the great concern of the ILO for the welfare of child labour is evident.

ILC adopted Minimum Age (Industry) convention (Revised) in 1937 and in 1948 ILC adopted Night work of young persons (Industry) Convention (Revised) - 1948. Besides industrial employment, the entry of children to other fields as child worker has been controlled by adopting many conventions including employment in Sea, Agricultural, Trimmers and stickers, Fisheries underground work and even to non industrial employments, right from 1920 to 1965. Again Minimum Age Convention, 1973 was adopted by the ILC to have a comprehensive coverage of child workers.

To sum up it may be pointed out, that upto 31st December, 1991, the ILC adopted 171 Conventions and 177 Recommendations. India has ratified only 34 conventions upto Dec 1991.⁷⁴ The list of ratified conventions by India is appended as Appendix No 1.

E ILO Standards and their Assimilation in India

India has ratified 34 ILO conventions during the period - 1919 - 1991. The Indian Legislature through various labour legislations have adopted the provisions of these conventions. However, the adoption of various provisions of the conventions of ILO in the labour legislations of its member state is not the only objective of ILO. The ultimate objective of the ILO is to enable all the workers of the world to enjoy the benefits of ILO standards. Thus legislation according to

74 Indian Labour Year Book 1993, Labour Bureau Ministry of Labour Govt of India

the provisions of the conventions is more important than the formal ratification of ILO conventions

The ILO conventions ratified by India deal with different labour matters. Therefore assimilation of ILO standards on the basis of the effectiveness of Indian Labour Legislations incorporating the provisions of ratified ILO conventions may be discussed under the following heads :

- A Child Labour
- B Women Labour
- C Forced Labour
- D Social Security
- E Wages
- F Trade Union Freedoms

A Child Labour :

India has ratified following ILO conventions relating to minimum age of employment -

- i) Minimum Age (Industry) Convention, 1919
- ii) Minimum Age (Trimmers and Stickers) Convention, 1921
- iii) Minimum Age (Underground work) convention 1965

Following Article 2⁷⁵ of the Minimum Age (Industry) Convention of 1919 section 67 of the Factories Act 1948 of India provides that

" no child who has not completed his fourteen years shall be required or allowed to work in any factory"

75 Minimum Age (Industry) Convention, 1919, Article 2 : Children under the age of fourteen years shall not be employed or work in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed

Similarly pursuant to Article 2 (1)⁷⁶ of the Minimum Age (underground work) convention 1965, section 45 of the Mines Act 1952 provides —

" that no person below eighteen years of age shall be allowed to be present in any part of a mine above ground where any operation connected with or incidental to any mining operation is being carried on"

whereas section 40 of the Act provides that, no person below eighteen years of age shall be allowed to work in any mine or part thereof

To ban effectively the employment of children below the age of fourteen years as per ILO conventions concerning minimum age of employment Indian Legislature enacted child Labour (Regulation and Prohibition) Act 1986 Section 3 of this Act provides that No child shall be employed or permitted to work in any of the occupations set forth in Part A⁷⁷ of the Schedule or in any workshop

76 Minimum Age (underground work) Convention, 1965, Article 2

- 1 Persons under a specified minimum age shall not be employed or work underground in mines
- 2 Each member which ratified this convention shall specify the minimum age in a declaration appended to its ratification
- 3 The minimum age shall in no case be less than 16 years

77 Part A, Occupations —

- Any occupation connected with —
- 1 Transport of passengers, goods or mails by railway
 - 2 Cinder picking, clearing of an ash pit or building operation in the railway premises ;
 - 3 work in a catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from one platform to another or into or out of a moving train ;
 4. work relating to the Construction of railway station or with any other work where such work is done in close proximity to or between the railway lines
 - 5 A port authority within the limits of any port

where in any of the processes set forth in Part B⁷⁸ of the schedule is carried on where 'Child' for the purposes of this Act is a person who has not completed his fourteenth year of age.⁷⁹ This Act to have a uniform 14 years of age for banning child labour has amended four statutes by its section 23 to 26 The Minimum Wages Act, 1948, Section 2 (bb) The Plantations Labour Act, 1951 Section 2 (a) and 2 (c) The Merchant Shipping Act, 1958, Section 109 and The Motor Transport Workers Act 1961, Section 2 (a) and 2 (c) incorporating fourteenth year of age in place of any other age

In spite of the legislation banning child labour in India as per standards of ILO, the children below the age of fourteen years can be found employed in the process enlisted as 'hazardous' by the child labour (Prohibition and Regulation) Act, 1986

A Survey conducted by the Government of India in the woollen carpet industry states that "In this industry, it was a common sight that children aged 5 years and above were weaving carpets under improvised sheds in scorching heat or biting cold depending upon the season⁸⁰ More or less the same condition of working

78 Part B Process :

- 1) Bidi making (2) Carpet weaving (3) Cement manufacture,
- 4) Cloth printing dying and weaving (5) manufacture of matches, explosives and Fireworks (6) Mica Cutting and Splitting
- 7) Shellack manufacture (8) Soap manufacture (9) Tanning (10) wool cleaning (11) Building and construction industry

79 Child Labour (Prohibition and Regulation) Act, 1986
Section 2 (11)

80 Report on the working and living conditions of workers in the woollen Carpet manufacturing industry in India, 1984-85 Labour Bureau, p 26

prevails in the carpet industry of Varanasi, Bhadohi and Mirzapur districts of Uttar Pradesh ⁸¹ Similarly about the child labour involved in Bidi manufacturing industry a publication of Ministry of Welfare of Government of India reveals that 'one of the main industries in which child labour is prevalent is bidi manufacturing ⁸²

Similarly flouting of ILO standards can be witnessed easily at Sivakashi, a small township in Tamilnadu, where children are employed in fire works and match industry completely violating the provisions of child labour (Prohibition and Regulation) Act, 1986 According to Smithu Kothari -

" The age of the children working here range 3½ to 15 years, and they work as long as twelve hours a day in degrading and hazardous working conditions " ⁸³

It is a matter of great concern that child labour (Prohibition and Regulation) Act 1986, has not recognised many of the hazardous occupations and processes For instance, employment in glass bangle industry, slate-pencil industry and brick kiln industry have not been recognised as "hazardous" under the Act As such, children below the age of fourteen years are employed in these occupations in complete disregard of Article 2 of Minimum Age (Industry) Convention, 1919 of ILO About glass bangle industry at Firozabad, Sheela Barse States -

81 See Kanbargi Ramesh, "Child Labour in India : The Carpet industry of Varanasi," Combating child Labour" edited by Assefa Bequela and Jo Boyden, ILO (1986) p 102.

82 'Encyclopaedia of Social work in India' vol one, Ministry of Social Welfare of India, August, 1987 p 84

83 "A documentation on law relating to employment of children" by National Centre for Human Settlement and Environment, New Delhi, 1988, p 114

" In Firozabad children in the age group of seven to twelve handle glazing glass and work close to the numerous furnaces even during summer when the temperature outside the factory is 40-45 celsius "84

Similarly at Mandasaur's slate-pencil industry,

" The children of 12 years of age, sometimes even less are forced to work in the sheds in the Mandasaur's slate pencil workshops to sustain their dying parents, as no cutter is known to survive in the industry for more than ten years "85

Similar is the case in Brick-Kiln industries

Contrary to the aim of the ILO to abolish child labour progressively, the Planning Commission of India States that -

" Total abolition of child labour with all its socio-economic ramifications does not seem to be feasible proposition in the immediate future "86

The irony of fact is that even after having the proper enactments prohibiting the child labour, there are about 15 million children upto 14 years of age, who should have been in schools, are found in various employments prohibited by law throughout the country 87

It is submitted that the word 'Hazardous' has been used in Article 24 of the Constitution banning child labour as well as in child labour (Protection and Regulation) Act, 1986, but it has not been defined anywhere. A precise definition of the word 'Hazardous' is the need for plugging the loopholes.

84. ibid p 153

85 India Today, Sept 30, 1990, p 59.

86 Sixth Five Year Plan, Planning Commission Govt of India, p 408

87 Indian Worker September 9-16, 1991, p 5.

B Women Labour : India has ratified following ILO conventions in regard to women workers -

- I Night work (women) Convention 1919
- II Night work (women) Convention (Revised) 1934
- III Night work (women) Convention (Revised) 1948
- IV Underground work (women) Convention 1935
- V Equal Remuneration Convention, 1951
- VI Discrimination (Employment and Occupation) Convention, 1958

Following ILO conventions concerning the nightwork of women, Factory Act 1948⁸⁸, Plantation Act 1951⁸⁹, Mines Act, 1952⁹⁰ of India, prohibit the employment of women workers during night. All these three Acts prohibit the employment of women workers between the hours of 7 P M to 6 A M as Article 2 of the Underground work (women) convention 1935 provides that 'no female whatever her age, shall be employed on underground work in any mine'. Section 46 (1) (a) of the Mines Act, 1952 provides that -

" no women shall not withstanding anything contained in any other law, be employed in any part of mine which is below ground "

However these Acts have limited scope because of their application to those women who are employed in the organised sector. In unorganised sector, the lot of women worker is pitiable. In the unorganised sector, where the factories Act does not apply the working conditions are appalling and the women are brutally exploited.⁹¹

88 Section 66 1 (b)

89 Section 25

90 Section 46 1 (b)

91 Manimekalai, N and Sundari, S "Female Labour Force in the unorganised sector of mat industries - Some evidence" The Indian Journal of Social Work Vol L11 No 2 (April- 1991)

Giving effect to the Equal Remuneration Convention 1951 of ILO Indian Legislature enacted 'Equal Remuneration Act, 1976 But the assimilation of this ILO standard has not been fully materialised in India

" Even after fifteen years, this Act has had almost no effect, the provisions of this Act are still not widely known "92

The indirect discrimination between men and women workers continue by employing women for unskilled and low paid jobs, evading the Equal Remuneration Act, 1976 also In the unorganised sector

" Women workers engaged in the unorganised segment suffer from disabilities and exploitation of much higher magnitude than those employed in the organised sector "93

A report of the Labour Bureau, on the 'Socio- economic conditions of women workers in selected Handloom and Khadi units in Uttar Pradesh stated that in those handloom units —

" male workers were predominantly skilled weavers and women were engaged almost exclusively in the unskilled occupation of yarn winding on bobbins and perns with the help of hand driven charkhas Consequently women workers working in those handloom units earn less than the male workers "94

So long as this indirect discrimination against women continues in the labour market of India, assimilation of Equal Remuneration Convention, 1951, would remain a dead letter of the statute

92 'SHRA' SHAKTI' by SEWA (Self Employed Women's Association), Feb 1989, p 44

93 See Indian Labour Journal, vol 32 April, 1991 p 1139.

94 Ibid, vol 32, August 1991 p 1442.

C Bonded Labour

India has ratified on 30 11 1954 the Forced Labour Convention 1930 of ILO. Pursuant to this convention, Bonded Labour System (Abolition) Act, 1976, was enacted in India. Article 1 of the above convention provided each member of the ILO which ratifies this convention undertakes to suppress the use of forced compulsory labour, in all its forms within the shortest possible period. In conformity to this convention, section 4 of the Bonded Labour System (Abolition) Act, 1976, provides that —

" on the commencement of this Act, the bonded labour system shall stand abolished and every bonded labourer shall on such commencement, stand freed and discharged from any obligation to render any bonded labour "

The State Governments are authorised to empower the District Magistrates to implement the provisions of this Act.⁹⁵ In consonance with Article 25⁹⁶ of the Forced Labour Convention, 1930 of ILO Section 16 of the Bonded Labour System (Abolition) Act 1976 provides that —

" whoever after the commencement of this Act, compels any person to render any bonded labour shall be punishable with imprisonment for a term which may extend to three years and also with fine which may extend to two thousand rupees "

Contrary to all these provisions the violation of the Act of 1976 in India is continuing unchecked. A recent report⁹⁷

95 Bonded Labour System (Abolition) Act, 1976, section 10.

96 The illegal exaction of forced or compulsory labour shall be punishable as a Penal offence and it shall be an obligation on any member ratifying this convention to ensure that penalties imposed by law are really adequate and are strictly enforced.

97 "The Report of the Commissioner for Scheduled Castes and Scheduled Tribes" Twenty ninth Report 1987-88 Government of India 1990

describes —

" The Coffee Plantations of Tamil Nadu are gold mines for their owners but the tribal, who nurtures them through his sweat and blood, is a 'prisoner' there. The limbs of labourers working for big landlords in Daltonganj and Champaran are chained in lieu of five Kathas (measure) of agricultural land. In many areas of the border of U.P. and M.P., working in the stone quarries is the destiny of the people; they can lose their life, should they dare to refuse to go to work; their limbs can be crushed by beating is an ordinary thing. Such oppression and such exploitation even after 14 years of the enactment of the law for liberation of bonded labourers, which is in the knowledge of administration about which even sensitive social workers out of sheer helplessness cannot but turn their face saying, "What to do!" is abominable. It is an open disregard of human rights, which is not merely a matter of regret, but is a matter of national shame for all of us "98

3 Justice Bhagwati of the Supreme Court has observed that —

" The pernicious practice of Bonded Labour has not yet been totally eradicated from the national scene and that it continues to disfigure the social and economic life of the country at certain places "99

According to S S Parkash Vattinagulapalli, (a village near Hyderabad) is flourishing with feudal land lordism, illiteracy and atrocities by the landlords on the bonded labourers 100

The apathy and laxity on the part of enforcing authorities as entrusted by the Act of 1976¹⁰¹ is the major cause of the unsatisfactory results of this Act. The Report of the National Centre for human settlement, narrates —

98. Id p VIII

99 Bandhua Mukti Morcho V Union of India, AIR 1984 S C 802 at 810

100 Parkash S.S. "Bonded Labour and Social Justice " (1990) p.98

101. See section 10 of the Bonded Labour System (Abolition) Act 1976

" In a writ petition filed by the Chattisgarh Krishak Mazdoor Sangh in the Supreme Court, when that court appointed a Commissioner to hold a local inquiry he found that he was obstructed at all levels. The administration gave no help, whereas the Local MLA himself a big landlord connived with the police to harass the Commissioner. Representatives of the petitioners were arrested and humiliated on fabricated charges of drunkenness and molestation. The Supreme Court not only had to take a very harsh view of such activities, but was forced to direct the District and Session Judge of Raipur to himself hold local inquiry. It is only thereafter that the district administration which had hitherto identified less than 90 bonded labourers, was forced to review its own findings and accept that as many as 20,000 workers in the agricultural fields alone are bonded labourers "102

According to the Report, even this figure was probably an under-estimation.

Planning Commission of India admits the existence of Bonded Labour System. It observes that an extreme manifestation of the sorry plight of rural unorganised labour is the bonded labour system.¹⁰³ In VI Five Year Plan also, the observation was that evils of indigence and exploitation involving the system of bonded labour has placed certain sections of the population in perpetual poverty, backwardness and dependence.¹⁰⁴

Thus the overall position which emerges testifies the fact that though India has ratified forced labour convention, 1930 of ILO way back in 1954, yet this convention has not been fully

102 'Bonded Labour and Its Abolition', Report Volume I, National Centre for Human Settlement and Environment, New Delhi, 1987, p 104.

103 VIIth Five Year Plan Planning Commission, Govt of India p 120

104 Vth Five Year Plan, Planning Commission, Govt of India, p 408

assimilated in India as the bonded labour system exist in India despite the enactment of Bonded Labour System (Abolition) Act, 1976 and presence of the Children (Pledging of Labour) Act, 1933 which incorporates pledging of children for labour, as illegal on advancement of money, a form of bondage for children of the debtor

D Social Security of workers :

India has ratified workmen's compensation (Occupational Diseases) Convention 1925 as well as workmen's compensation (Occupational Diseases) Convention (Revised) 1934 Article 1 of these conventions provides that —

" Each member of the ILO which ratifies this convention undertakes to provide that compensation shall be payable to workmen incapacitated by occupational diseases, or, in case of death from such diseases, to their dependents in accordance with the general principles of the national legislation relating to compensation for industrial accidents "

These conventions also specify the diseases in their schedules for which the employers are liable to pay compensation to workmen if these diseases are contracted by the workmen during the course of employment

In conformity with these conventions it may be said, that the workmen's compensation Act, 1923 had already enlisted occupational diseases for which employer is liable to compensate the workman if he has contracted occupational disease in the course of employment

It has been observed, that the claimant of compensation under the Act seldom get compensation without the aid of the courts Change of approach on the part of the employer in this regard is very much desirable

Besides the workmen's Compensation Act, 1923, there are other social security enactments - viz Employees State Insurance Act, 1948, Employees Provident Fund and Miscellaneous Provisions Act, 1952, with its amendments, Maternity Benefit Act, 1961, Payment of Bonus Act 1965 with its amendments, Payment of Gratuity Act, 1972, etc including Coal Mines Labour welfare Act 1947 and Mica Mine Labour welfare Acts 1946, which safeguard the welfare of the workers during the course of employment as well as after their retirement. The common aim of all these legislations is to provide protection and benefits against contingencies. However, the common drawback of all these legislations is that they apply only to organised segment of the labour. For unorganised sector, there is no legislation to provide social security to them. The social security (Minimum standard) Convention 1952 of ILO has yet to be ratified by India. Likewise Maternity Protection Convention 1919 and Maternity Protection Convention (Revised) 1952 have not been ratified by India. But Maternity Benefit Act, 1961 was enacted by Indian Legislature to give benefits to women workers who have worked for not less than eighty days in the twelve months preceeding the date of her expected delivery in an establishment of the employer from whom she claims maternity benefits. As Article 3 of the Maternity Protection Convention 1919 of ILO prohibits the employment of women for certain period before and after the child birth, section 4 of the Maternity Benefit Act, 1961 prohibits the employment of women during six weeks before and six weeks after the child birth (or after the miscarriage as the case may be) with full wages. The provision of Maternity benefit is also provided under

Employees State Insurance Act, 1948 These two Acts have limited application to organised women workers having a rider of establishments, employing 20 or more persons Thus a vast majority of women workers are outside the purview of the beneficial provisions of these two Acts

It is submitted that —

the norm of social justice, "within the sphere of labour management relationship, it may mean removal of inequalities in service and living conditions by granting a minimum wage, a comfortable work schedule and humane working conditions It may also mean providing opportunities to employment to those who are deserving and yet unemployed It may even mean those acts which promote rational distribution of wealth or an even growth of various sectors of community,"¹⁰⁵

which is equivalent to social security in context to labour - management in India has not been fulfilled by our present legislation

E wages

India has ratified Minimum Wage Fixing Machinery Convention, 1928 of ILO on 10 1 1955 Article 1 of this convention provides that —

" each member of the ILO which ratifies this convention undertakes to create or maintain a machinery whereby minimum rates of wages can be fixed for workers employed in trades or parts of trades (and particularly in home working trades) in which no arrangement exists for the effective regulation of wages by collective agreements or otherwise and wages are exceptionally low "

105 Justice Gulab Gupta : Our Industrial Jurisprudence, 1987, p 74.

In conformity with Minimum Wage Fixing Machinery Convention, 1928, Indian Legislature has enacted Minimum Wages Act 1948. In parity with Article 1 of the Minimum Wages Fixing Machinery Convention, 1928 of ILO Section 3 of the Minimum Wages Act, 1948 of India empowers the central as well as State Governments to fix the minimum rates of wages payable to employees employed in an employment specified in Part I or Part II of the schedule and in an employment added to either part of the schedule by notification under section 27 of the Act. Section 3 of the Act further provides that the appropriate Government shall review at such intervals as it may think fit such intervals not exceeding five years, the minimum rates of wages so fixed and revise the minimum rates if necessary. Section 3 (2) of the Act, further provides that, the appropriate government may fix minimum rate of wages for time work as well as for piece work.

The Minimum Wages Act, 1948 is the most relevant and important piece of legislation for the unorganised sector of workers as the whole scheme of the Act is precisely designed for them. Moreover, this Act is in close conformity with the ILO convention of 1928. But the assimilation of the Minimum Wage Fixing Machinery Convention 1928 has not been upto the mark in India inspite of the existence of Minimum Wages Act 1948, because of its non-implementation. Instances of payment of wages less than the minimum as prescribed by the Act in Handloom industries of Haryana and Uttar Pradesh and in Building and Construction, Industry of Delhi, Madras and Bombay are galore.¹⁰⁶ Though for timely payment without illegal deductions

106 See *Asiad Case* AIR 1982 SC 1473 (*Peoples Union for Democratic Rights V Union of India*) AIR 1982 SC 1473

from the wages, the Payment of Wages Act, 1936, and Uttar Pradesh Industrial peace (Timely payment of Wages) Act 1978 for the State of Uttar Pradesh have been passed. The latter Act ensures timely payment of group of workers in an establishment through the Labour Commissioner in case of default by the employer making recovery as an arrear of land revenue with ten percent recovery charge if the wage bill exceeds 50,000/- rupees

F Trade Union Freedoms :

India has ratified following ILO conventions concerning Trade Union Freedoms —

- I Right of Association (Agriculture) Convention, 1921
- II Rural worker's organisation convention 1975
- III Tripartite Conciliation (International Labour Standards) Convention, 1976

Article (1) of the Right of Association (Agriculture) Convention, 1921, provides that —

" Each Member of the International Labour Organisation which ratifies this convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture "

Similarly Rural workers Organisation Convention, 1975 aims at promoting organisation of rural workers. These two conventions of ILO are yet to be assimilated in India, as the vast majority of workers employed in agriculture is unorganised. Trade unions set up under the Trade Unions Act 1926 together with Inter State Migrant Workman (Regulation of Employment and Conditions of Service) Act, 1979 also have neglected agricultural workers,

inspite of the fact that freedom of Association is guaranteed in the Constitution of India as a fundamental right ¹⁰⁷

To sum up, it is submitted as a founder member of ILO, India has been ratifying ILO conventions since 1921. During the period 1921-1978 India has ratified thirty four conventions out of this sixteen conventions were ratified before the Independence of India. After 1978 India has not ratified any convention. Though India has not ratified many of the conventions yet an influence of the unratified ILO conventions is reflected in the constitution, Labour Legislations¹⁰⁸ National Labour policies and Five Year plans of India. It is submitted that though due to economic reasons, India has not been able to ratify formally most of the ILO conventions, yet all pervasive influence of ILO conventions and recommendations in India cannot be denied. This is so because the idea and concept contained in a particular convention moulds the public opinion and the employers and the government sometimes prefer to apply the idea in practice without formally ratifying the convention itself which contains it.

107 Article 1° (1) (c)

108 For example Maternity Benefit Act, 1961 was enacted without ratifying formally the conventions on the subject, convention No 3 and 103. Likewise Indian Merchant Shipping Act, 1958 was enacted without ratifying conventions Nos 7, 8, 9, 13, 23, 58.

List of Conventions Ratified by India upto Jan 1, 1992

Sl no	Title and No	of Conventions	Date of Ratification
1	No 1	Hours of work (Industry) Convention, 1919	14 7 1921
2	No 3	Unemployment Convention, 1919*	14 7 1921
3	No 4	Nightwork (women) convention, 1919	14 7 1921
4	No.5	Minimum Age (Industry) Convention, 1919	9 9 1955
5	No 6	Nightwork of young persons (Industry) Convention, 1919	14 7 1921
6	No 11	Right of Association (Agriculture) Convention, 1921	11 5 1923
7	No 14	Weekly Rest (Industry) Convention 1921	11 5 1923
8	No 15	Minimum Age (Trimmers and Stockers) Convention, 1921	20 11 1922
9.	No 16	Medical Examination of Young persons (Sea) Convention 1921-	20 11 1922
10	No 18	Workmen's Compensation (Occupational Diseases) Convention, 1925	30 9.1927
11	No 19	Equality of Treatment (Accident Compensation) Convention, 1925	30 9 1927
12	No 21	Inspection of Emigrants Convention, 1926	14 1 1928
13	No 22	Seamen's Articles of Agreement Convention 1928	31 10 1932
14	No 26	Minimum Wage - Fixing Machinery Convention, 1928	10 01 1955
15	No 27	Marking of Weight (Packages Transported by Vessels) Convention, 1929	7 9 1931
16	No 29	Forced Labour Convention, 1930	30 11 1954
17	No 32	Protection against Accidents (Dockers) Convention (Revised) 1932	10 2 1947
18	No 41	Night work (women) Convention 1934 £	22 11 1935
19	No 42	Workmen's Compensation (Occupational Diseases) Convention (Revised) 1934	13 1 1964
20	No 45	Underground work (women) Convention, 1935	25 3.1938

* Ratification denounced

£ Ratification is no longer in force as the later convention (89) on the subject has been ratified by India

Sl no	Title and No of Conventions		Date of Ratification
21	No 80	Find Articles Revision Convention, 1946	17 11 1947
22.	No 81	Labour Inspection Convention, 1947	7 4 1949
23	No 88	Employment Service Convention, 1948	26 4 1959
24	No 89	Nightwork (Women) Convention (Revised), 1948	27 2 1950
25	No 90	Nightwork of young persons (Industry) Convention (Revised), 1948	27 2 1950
26	No 100	Equal Remuneration Convention 1951	25 9.1958
27.	No 107	Indigenous and Tribal Population Convention, 1957	25 9 1958
28	No 111	Discrimination (Employment and Occupation) Convention, 1958	3 6 1960
29.	No 115	Radiation Protection Convention, 1960	17 11 1975
30	No 116	inal Articles Revision Convention 1961	22.6.1962
31	No 118	Equality of Treatment (Social Security) Convention, 1962	19.8 1964
32	No 123	Minimum wage (underground work) Convention 1965	20 3 1975
33	No 141	Rural workers Organisation Convention, 1975	18 8 1977
34	No 144	Tripartite Consultation (International Labour Standards) Convention, 1975	27 2 1978

(Source Indian Labour Year Book 1993, Labour Bureau
Ministry of Labour, Government of India)

CHAPTER - VII

JUDICIAL RESPONSE TO THE INDUSTRIAL
EMPLOYMENT LAW IN INDIA

A. Introductory Prologue :

Unlike the British Judicial set up where, because of Supremacy of Parliament, the role of judiciary is confined to interpret the law and no more, the Indian judiciary has not been so constrained and confined. Even, after the introduction of English law in India,¹ the Judges of Indian Courts have been more free than their counterparts in England in interpreting a statutory provision as well as in dispensation of Justice. The reason being, that they wanted to please the ryats - the local people i.e. the natives and stabilise the British Raj. The independence of judiciary was nurtured during the pre-constitution era though for far different reasons yet this independence of judiciary became a way of life and has been distinctly provided for in the constitution itself. Our Judiciary is more powerful than the British in the sense that a British Judge cannot declare a statute passed by the British Parliament as null and void, but the judiciary in India can do so if the statute happens to be beyond the limits laid down by the constitution.

The role of judiciary in the application, development and interpretation of a branch of law has been unique in India. Wherever, legislation has been lacking to solve a problem the judiciary has come forward with suggestions,² solutions and

1 By the charter of 1726 In *Bhunoo momy Devø V Notobar Biswas* (ILR 28, Cal 452), Calcutta High Court held that common law of England was introduced at Calcutta from 1726.

2 *Joginder Kumar V State of U.P.* (1994) A Cr C 431 (AIR 1994 SC 1349). In this case, a full code of right and duties of Police regarding arrest and detention of people has been suggested by the court, emphasising the importance of maintaining an equilibrium in between individual freedom and curbing of criminal activities.

sometimes, even codes³ The Judiciary has given a sort of legislation through its judgements to curb the exploitation of adoptive children by foreigners⁴, the concept of Industry⁵ the meaning of retrenchment⁶ the application of various types of incentives in production e.g Bonus⁷ etc and the meaning of occupational diseases⁸ etc so far as the industrial law is concerned

Judiciary stimulates legislation it sometimes compels the government to amend the present statute sometimes to repeal it and sometimes the Government itself brings in a new statute to annul the effect of the judgement⁹

To avoid the Transgression of assigned powers, because of the concept of separation of powers as it works in a democratic set up having the constitutional superiority as is obtained in India, the judges cannot be expected to legislate to solve a given problem. They suggest, they 'fill in the gap' while interpreting a statute. They expand the dimension of a meaning and its coverage and sometimes they revolt as an activist to dispense justice to be available easily and speedily, it is true. Like

3 Anand Bihari V Rajasthan State Road Transport Corporation 1991 Lab IC 494

4 Lakshmi Kant Pandey V Union of India AIR 1984 SC 469.

5 Bangalore water supply V A Rajappa AIR 1978 SC 548.

6 Gujarat Steel Tubes Ltd V Gujarat Steel Tubes Mazdoor Sabha (1980) Lab IC 1004

7 Jalan Trading Co Pvt Ltd V D M Aney (1979) 1 Lab LJ 162 (SC)

8 Supra Note 3

9 Mohd Ahmad Khan V Shah Banu Begum AIR 1985 SC 945 and Muslim Women (Protection of Rights on Divorce) Act 1986

other reformers, the judiciary too has been an arm of social revolution in many societies particularly in the democratic ones ¹⁰ The social context of the judiciary is now readily apparent and the society has become increasingly interested in the contribution of the judiciary to the development of a social philosophy rather than in the decision for its own sake ¹¹ Indian judiciary has been playing a positive role in the development of industrial law ever since the independence of India. Slowly but surely a new industrial jurisprudence has emerged with a decisive thrust towards social justice through the landmark judgements of the Supreme Court and High Courts of India. The unique role assigned to the Supreme Court of India and the High Courts under the parameters of constitutional philosophy through the power of judicial review has tended to revolutionise the approach and interpretations opposed to attitude adopted by the employers ¹²

This chapter incorporates important aspects and constituents of industrial employment law as a response from the judiciary to problems which a developing industrial jurisprudence faces and it is heartening to note that the higher judiciary has always kept the ultimate goal of Indian polity - 'The Social Justice,' in high esteem

10 Dr. Gupta N H 'Social Security Legislation for Labour in India' 1986 p 178

11 Massey I P "Judicial Activism and the Growth of Administrative Jurisprudence in India" Indian Bar Review Vol 17 (1+2) + 1990 p 55

12 Sharma G S ; Trade Union Freedoms in India (1990) p 190

The Industrial Employment Law consists of certain constituents around which it revolves making them certain so that beneficial provisions are readily available to them. Then there are certain concepts which lead us to attain our goal of social justice in industrial jurisprudence. Some important terms and expressions which form the basis of industrial employment law shall find a place one by one to evolve the composite picture of industrial employment law in India.

After the Independence the various beneficial statutes began to be enforced in the perspective of social justice vigorously. Thus clashing with the profit motive of the employers. The result was that the statutes so enforced were challenged by the employers alleging to be unconstitutional and infringing their fundamental rights to carry on Trade and business under Article 19 (1) (g) of the constitution.¹³

Likewise the efficacy of Article 136 of the Constitution was challenged in Bharat Bank V Employees,¹⁴ whether the Supreme Court would be justified under Article 136 in interfering with the awards made by Industrial Tribunals. The full bench of the Supreme Court in majority judgement in this case held that the awards made by Industrial Tribunals are subject to appeal to the Supreme Court under Article 136 of the constitution.

In Bijoy Cotton Mills Ltd V State of Ajmer¹⁵, the Supreme Court upheld the validity of the provisions of the minimum wages Act 1948,

13 See Bijoy Cotton Mills Ltd V State of Ajmer AIR 1955 SC 33

14 (1950) SCR 459

15 Supra Note 13

holding that the restrictions imposed on the freedom of contract by this Act¹⁶ were reasonable and had been imposed in the interest of the general public

As a result of this decision subsequent decisions by Industrial Tribunals and the Supreme Court have held that the employer is bound to pay a minimum wage and in imposing upon him the liability to pay a minimum wage the question about his capacity to pay is totally irrelevant¹⁷

The Supreme Court had been very much eager from the very beginning to implement the 'social justice', in the field of Industrial Employment. In Rai Bahadur Dewan Badri Das V Industrial Tribunal¹⁸ the Supreme Court observed -

" The doctrine of the absolute freedom of contract has to yield to the higher claims of social justice. In the case of industrial adjudication, the claims of the employer based on the freedom of contract have to be adjusted with the claims of industrial employees for social justice "¹⁹

Similarly in J v Cotton Spinning and Weaving Mills Ltd V Labour Appellate²⁰ the Supreme Court has held that -

" The ultimate object of industrial adjudication is to help the growth and progress of national economy and it is with that ultimate object in view that industrial disputes are settled by Industrial adjudication on principles of fair play and justice "

16 Minimum Wages Act 1948.

17 "Report of the National Commission on Labour" Govt of India Ministry of Labour and Employment and Rehabilitation 1969, p 56

18 (1962) II LLJ 366 SC

19 Id p 371

20 (1963) II LLJ 436 SC

B Constituents

Let us examine the various constituent terms and expressions of the Industrial Employment as evolved by the Supreme Court

I Industry : The categorisation of workers and accrual of benefits to them under the provisions of various labour laws very much depends upon the term industry as defined under the Industrial Disputes Act, 1947 Section 2 (j) Conflicting opinion of the Supreme Court right from 1953 to 1978 about the scope and coverage of the expression 'Industry' has created a lot of confusion ²¹

In Bangalore Water supply and sewerage Board V A Rajappa ²² the expression 'Industry' has been explained vividly by Justice Krishna Iyer asserting that "industry as defined in section 2 (j) has wide import" and gave a new dimension to the expression 'Industry' by saying —

" There is prima facie an 'industry' in an enterprise if there exists —

- i) Systematic activity ,
- ii) Organised by cooperation between employer employee (direct and substantial element is chimerical) ,

21 Budge-Budge Municipality V P.R. Mukherjee (1953) 1 Lab LJ 195 (SC); Corporation of City of Nagpur V Its Employees (1960) 1 Lab LJ 523 (SC) & State of Bombay V Hospital Mazdoor Sabha (1960) 1 Lab LJ 251 (SC) — These decisions widened the scope and coverage of the expression 'Industry' But later decisions viz University of Delhi V Ram Nath (1963) 11 LLJ 350 (SC) National Union of Commercial Employees V Meher (1962) 1 Lab LJ 241 (SC) Madras Gymkhana Club Employees Union V Gymkhana Club (1967) 11 Lab LJ 720 (SC) Cricket Club of India Ltd V Bombay Labour Union AIR 1969 SC 776 & Management of Safdarjung Hospital V Kuldeo Singh Sethi AIR 1970 SC 1407 have again narrowed down the coverage and scope of the expression 'Industry'

22 AIR 1978 SC 548

- (iii) For the production and or distribution of goods and services calculated to satisfy the human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss i.e. making on large scale, Prasada or food) ,
- b. It follows, therefore that the absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector
 - c. The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations ;
 - d. If the organisation is a Trade or business it does not cease to be one, because of philanthropy animating the undertaking "

The widening of the scope of the expression 'Industry' as was the consequence of the above decision, led to an enhancement in the rank and purview of the workmen, i.e. hitherto those who were outside the entity of workmen now because of the exposition of the term 'industry' in this case were to be treated as workmen

The consequences of Bangalore Water Supply²³ case may be listed as follows —

- a) Professions, clubs, educational institutions, cooperatives research institutes, charitable projects and other kindred venture if they fulfil the triple test will be treated as industry as per section 2(J)²⁴ of Industrial Disputes Act, 1947
- b) A restricted category of professions clubs, cooperatives and even gurukulas and small research laboratories may be

23 Id.

24 Section 2(J) defines industry as "Industry means any business, trade undertaking manufacture calling of employers and includes any calling, service, employment handicraft or industrial occupation or avocation of workmen

exempted from being treated as 'industry' provided they are simple ventures substantially and after applications of the 'Dominant Nature' criterion they absolve, themselves from being an 'industry' as explained above ('Dominant Nature means where a complex nature of activities some of which qualify for the exemption, others not, involves employees on the total undertaking, some of whom are not workman as in University of Delhi V Rannath²⁵ or some departments are not productive of goods and services if isolated even then, the predominant nature of the services and the integrated nature of the departments as explained by the Supreme Court in Corporation of Nagpur²⁶ will be the true test. The whole undertaking will be 'industry' although those who are not workmen by definition may not benefit by the status of the undertaking)

- c) Pious or altruistic mission where many employ themselves free or for a small honoraria or like return are also exempt from the scope of the 'industry'.
- d) Sovereign functions strictly understood qualify for exemption welfare activities, economic ventures undertaken by the Government or statutory bodies do not qualify for the exemption. Even in Departments discharging sovereign functions, if certain units which are industries and are substantially severable, they can also be treated within the purview of section 2 (J) of the Act ²⁷

25. Supra Note 21.

26 Supra Note 21.

27 Industrial Disputes Act, 1947

- e) The doctrine of Master and servant of Common Law will not be applicable to those workers who will be covered under the term 'Industry' as propounded by this Judgement (Under the Master and Servant doctrine, the relationship of the Master and the servant is based on freedom of contract and its breach even wrongfully dismissal by the employer leads to a claim of damages by the workman and not his reinstatement)
- f) The legislative response to this judgement was the enactment of the Industrial Disputes (Amendment) Act 1982 with an aim to curb the wide scope of 'Industry' as propounded by this judgement by excluding agricultural operations, hospitals and dispensaries, educational, scientific research and training institutions, charitable social and philanthropic services, khadi and village industries, domestic services and professional services from its scope and ambit. Other portions of the Amendment have been brought into force from 21.8.1984 but the provisions dealing with the definition of industry have not been enforced hence the ruling of this case still holds good.

The categorisation of employees as industrial to attract the application of this branch of law seems lopsided in context to the workers as a whole. As pointed out by Justice Gulab Gupta,

'A distinction between the employees on the basis of their place of employment is apparently arbitrary and left large number of our employees on the mercy of their employers. This legislative policy is therefore partly responsible for existence of Sweated labour' 28

It would be better if the law is applied to all workmen irrespective of their place of employment.

" Indeed, a unified system of adjudication would rather develop this jurisprudence in a unified manner and in a consistent fashion "29

Following the judgement of Bangalore water supply³⁰, in Karnani Properties Ltd V State of west Bengal³¹, the Supreme Court held that a company engaged in business of letting flats to tenants in buildings owned by it is an 'industry'. In this case the Karnani Properties Ltd was a company incorporated under the Companies Act, 1956. There were about 300 flats in the mansions owned by this company. The company let out these flats to tenants and also rendered services like free supply of electricity, washing and cleaning of floors and general repairs and maintenance etc. For these purposes, the company had employed over 50 persons, namely, sweepers, plumbers, Maillies, liftman etc. A dispute arose between the company and its employees. The Government of West Bengal referred the case for adjudication to the Industrial Tribunal under the Industrial Disputes Act, 1947. The company objected before the tribunal contending that the company was not 'industry' within the meaning of section 2 (J) of the Industrial Disputes Act, 1947. But the Supreme Court held that the activity carried out by the appellant falls within the ambit of the expression 'industry' defined in section 2 (J) of the Act as construed by this court in Bangalore water supply and sewerage Board case.³²

29. Id

30. Supra Note 22.

31. AIR 1990 SC 2047

32. Supra Note 22

Similarly in Sumerchand V Labour Court³³ the High Court of Punjab and Haryana following the decision of Supreme Court given in the Bangalore water supply case has held university as an 'industry' and held a carpenter employed in university as a workman within the definition of workman under section 2 (k) of the Industrial Disputes Act, 1947. The Petitioner in this case was employed as a carpenter in the Kurukshetra university. He raised an industrial dispute and claimed a reference to the Labour Court when he was removed illegally from the service. The Labour Court admitting the contention of the university that it is not an industry refused to try the dispute under the Industrial Disputes Act. But, the High Court holding Kurukshetra University an industry made the following observation :

" the decision of the Presiding Officer of the Labour Court is erroneous and cannot be sustained in the eyes of law in the view of principles well settled by the apex court. It has been observed in Bangalore water supply and Sewerage Board V A Rajappa (1978-1-LLJ 349) that a university is an industry, particularly with respect to small workers like mali chowkidar, carpenter etc "34

II Manufacturing Process : Like 'Industry' the expression 'Manufacturing Process' also helps in determining the status of a worker whether he belongs to the category of an industrial worker as defined under section 2 (k) of the Factories Act 1948. If a person is found to be connected with manufacturing process, he will be treated as an industrial worker and laws pertaining to industrial labour will be applicable to him otherwise the employer will deprive

33 1992 1 LLJ 395 (P & H)

34 Ibid

him of the securities and benefits provided by the labour laws ³⁵

In Pavl Shanker Sharma V State of Rajasthan ³⁶ the petitioner firm was having two wings (1) Service Station and (2) Petrol Pump under his direct control and supervision. At the service station washing, cleaning and lubricating of the vehicles was done and aid of the power was also taken. At the Petrol pump the petrol/diesel was stored in an underground tank and the same was pumped out to be filled in the vehicles of the customers with the aid of the power.

It was to be decided whether the petitioners activities fall within the definition of 'Manufacturing Process' as defined under Section 2(f) of the Factories Act 1948. To arrive at the decision the court made a reference to G.R Kulkarni V The State, ³⁸ where in it was observed -

" It is obvious enough that the process of manufacture from one article to another changes and there are so many different processes in existence that to take the analogy of any single manufacturing process is likely to cause confusion. It is better therefore to apply one's mind to the exact process employed by which one article is shaped into another and to see whether the purpose of the Act are satisfied " ³⁹

These observations were made in connection with the interpretation of the provisions of the Sales Tax Act. They are of general nature, and are not with reference to the definition of 'manufacturing process' as given in the Factories Act. Again the reference was made to -

³⁵ Rohita's Industries Ltd V Ram Lakhan Singh (1979)
1 Lab LJ 515 (SC)

³⁶ AIR 1993 Paj 117

³⁷ See 2 (f) of the Factory Act, 1948

³⁸ AIR 1957 MP 45

³⁹ Id at 48

Col Sardar C.S Angre V The State,⁴⁰ It is a case of cold storage and question was whether the grading of potatoes for storing in the cold storage or drying of the potatoes amount to a manufacturing process. Grading was held to be manufacturing process if done to bring standardized goods or variety of goods for saleable purpose as such into existence otherwise the exercise is casual, it is not a manufacturing process. Process of drying if it is not in relation to adaptability of the article for sale or use it is not a manufacturing process. Here it is only to remove the moisture collected during the process of refrigeration and not with a view to adapt potatoes for sale. Again the case of —

Employees State Insurance Corporation V M/s Triplex Dry cleaners⁴¹ was referred. In this case the question arose whether the activity of washing and cleaning in a dry cleaning business is a manufacturing process or not. Relying upon the Judgement of Madras High Court in re A M Chinniah⁴² and C.S. Angre V State,⁴³ the test of for manufacturing process was applied that there must be a transformation. In other words, some new article or substance should come into being with a view that the same can be used, sold, transported, delivered or disposed of in order to call the process as manufacturing process. Applying the above test it was found that dry-cleaning business does not fall within the purview of manufacturing process. Again, the case of Bhog Singh V Employees State Insurance Corporation⁴⁴ was looked into. It was also a case

40 AIR 1965 Raj 65

41 1982 Lab IC 944

42. AIR 1957 Mad 755

43 Supra Note 40

44 1983 Lab IC 412 (Haryana & Punjab)

of Petrol pump and service station for repairs of motor cars. Both the activities were held to be out of the purview of manufacturing process. Again the view of Bombay High Court in Gateway Auto Service V Regional Director Employees State Insurance Corporation⁴⁵ was looked into. Here also the Petrol Pump and service station were owned where washing, cleaning and oiling of vehicles were done. The question of manufacturing process was decided by the Bombay High Court by holding that both the activities were covered under section 2 (k) of the Factories Act 1948. Thus the different High Courts have different view on manufacturing process. In the present case of Ravi Shanker Sharma,⁴⁶ the Court held that service station to be under the purview of manufacturing process, while pumping of petrol or diesel to ~~be~~ sold to the customers not a manufacturing process.

III worker and its cognate expressions — The most important constituent of Industrial Employment law is the worker, the human participant in the production process of an industrial establishment. This participant has been defined as 'worker' in the Factories Act 1948, 'as workman' in the Industrial Disputes Act 1947 and workmen's Compensation Act 1923, 'Employee' in the Employees State Insurance Act 1948. In Sales Promotion Employees (condition of services) Act 1976, the expression 'workman' has been used. But these expressions are not interchangeable. Then again there is another categorisation of seasonal and perennial workers having in its fold part time, Temporary, permanent, Badli and casual workers. An attempt to give the privileges of labour laws to those who in strict sense do not

45 1981 La IC 49 (Bom.)

46 Supra Note 36

fulfil the attributes of a worker but in the shape of "dependent interpreneur"⁴⁷ is no doubt laudable, yet, it is submitted it craves for an undisputed unified definition of persons who participate in the production processes of an industrial establishment and other cognate organised activities, so that a common expression may be available without any confusion to cover them

To palliate the conditions of workers generally and 'dependent entrepreneur' type of workers particularly, the expression 'workman' needed liberal interpretation to include in the fold of workman all those persons who having no independent calling of their own work for the enterprise of another and depend for their income on the hire or reward which they get in respect of their engagement e.g. handloom weavers cigar rollers Bidi workers Match Box framers steel trunk makers, goldsmiths and ~~etc~~ Brass-workers etc

In Hussain Bhai V Alath Factory,⁴⁸ the Supreme Court extended the coverage of workman to include 'dependent interpreneur' in its fold This decision was an improvement over the Dharangadhra Chemical works v State of Saurashtra⁴⁹ wherein the term workman was interpreted to denote -

" An employment of his by the employer and that there should be the relationship between the employer and him as between employer and employee or master and servant Unless a persons is thus employed, there can be no question of his being a workman within the definition of the Term as contained in the Act "50

47 See Hussain Bhai V Alath Factory (1978) 11 Lab LJ 397 (SC)

48 *ibid*

49 (1957) 1 Lab LJ 477 (SC)

50 *Ibid* at 480

Thus the judicial requirement of a workman being employed as servant restricts the coverage of the fold of the definition of workman and excludes besides independent contractors dependent entrepreneurs as well. The Hussain Bhai decision of 1978 is certainly an improvement over the Dharangadhra decision of 1957.

Justice Krishna Iyer of Supreme Court in Hussain Bhai, laid down the scope of the term worker ;

" where a worker or group of workers labours to produce goods or services and those goods or services are for the business of another, that other is in fact the employer. He has economic control over the worker's subsistence, skill and continued employment. If he for any reason chokes off, the worker is virtually laid off. The presence of intermediate contractor with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth though drapped in different perfect paper arrangement that the real employer is the Management and not the immediate contractor "51

But again in workmen of the Food Corporation of India v Food Corporation of India,⁵² the Supreme Court reverted back to its 1957 standpoint and held that—

• "the essential condition of a person being a workman with in the terms of the definition is that he should be employed to do the work in the industry and that there should be an employment of his by the employer and that there should be a relationship between the employer and him as between the employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman with in the definition. Thus where a contractor employs a workman to do the work which he contracted with a third person to accomplish, the workman of the contractor would not without something more become a workman of that third person "

51 Supra Note 47 at 398

52 (1985) 11 LLJ 4 (SC)

Thus the immediate employer will be treated as the actual employer and responsible to the worker as an employer. The zeal to lift the veil and locate the employer for any claim or remedy sought by the worker is no more needed.

The 'worker' as defined in section 2 (1) of the Factories Act, 1948, was the subject matter of Rohtas Industries Ltd V Ram Lakhan Singh,⁵³ before the Supreme Court in reference to "Subject of the manufacturing process" occurring in the definition of the term 'worker'. In this case, the respondent was appointed as section officer in the waste paper department and his duty was to maintain quality and weightment of waste papers and rags, the basic raw material used for the manufacture of duplex board and vulcanised fibre. He maintained records of stocks and dealt with receipts. He also passed bills of the suppliers of the waste paper and rags. He used to work in the precincts of the factory as well as outside it - the paper sorting house - which was situated away from the factory.

The management terminated his services without framing any charge or holding any domestic enquiry. He was not given any wages in lieu of notice. Under these circumstances, the Court was to decide whether he was a 'worker' under the purview of section 2 (1) of the Act. The court held him to be a 'worker' stating that the respondent's job in connection with the raw materials was so essential to the manufacturing process that it made it a 'subject of manufacturing process'.

53 Supra Note 35.

In Hyderabad Asbestos cement Products V Employees State Insurance Court,⁵⁴ the Company had a production unit and several zonal offices where in sales, canvassing and other activities in connection with the main product, were carried on. The employees of the zonal offices were denied the protection of state insurance benefits on the ground that they were not employees of the factory but the establishment and hence did not fall within the scope of the Act.⁵⁵ The Supreme Court held that the expression 'employee' includes any person working in the factory or establishment with regard to the purchase of raw materials for or the distribution or sale of the products of the factory or establishment, and accordingly employees of the zonal offices were also allowed to get the benefits of the Act.

In Poyal Talkies V Employees State Insurance Court,⁵⁶ the management was the owner of the theatre. There was a canteen and a cycle stand in the premises of the theatre. The canteen and cycle stand were leased out to contractors under an instrument of lease. The contractors employed their own servants to run the canteen and the cycle stand. The question was whether the employees of the canteen and cycle stand were employees within the meaning of the Act.⁵⁷ The Court answering the above question affirmatively held—

" No one can seriously say That a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the Theatre. All that the statute requires is that the work should not be irrelevant to

54 (1978) 1 Lab LJ 181 (SC)

55 Employees State Insurance Act 1948

56 (1978) 11 Lab LJ 390 (SC)

57 Supra Note 55

the purpose of the establishment It is sufficient it is incidental to it In our view clearly, keeping a cycle stand and running a canteen are incidental or adjunct to the primary purpose of the theatre "58

The recent trend in deciding the status of a person whether he is a workman or not, has been more on factual conditions instead of idealism

In H.R. Adyanthaya V Sandoz (India) Ltd ⁵⁹ the Supreme Court while dealing with the definition of workman under the Industrial Disputes Act 1947 under section 2 (s) and Sales Promotion Employees (condition of service) Act 1976 section 2 (d), held that the classification of those employed to do supervisory work has been made on the basis of their monthly income although the work done by the two sections of the workmen is the same The protective umbrella need not cover all workmen doing a particular type of work There may be a classification of workmen doing same nature of work on the basis of their income Service conditions and their protection cannot be treated as fundamental rights The claim of medical representatives to be treated as workman was rejected ~~the~~ The Supreme Court, in this case, pointed out that till 29th August, 1956 the definition of workman under Industrial Disputes Act, 1947 was confined to skilled and unskilled manual or clerical work and did not include the categories of persons who were employed to do supervisory and technical work The said categories came to be included in the definition with effect from 29.8 1956 By 1982 (Amending Act No 46 of 1982), the Industrial disputes Act, 1947 was

58 Supra ote 56 p 395-96

59 AIR 1994 SC 2608

amended and the categories of workmen employed to do 'operational' work came to be included in the definition. By this amendment for the first time those doing non-manual unskilled and skilled work also came to be included in the definition with the result that the persons doing skilled and unskilled work whether manual or otherwise qualified to become workmen under the Industrial Disputes Act, 1947.

Hence the position in Law as it obtains today is that a person to be a workman under the Industrial Disputes Act 1947, must be employed to do the work of any of the categories viz, manual unskilled, skilled, technical, operational clerical or supervisory. It is not enough that he is covered by either of the four exceptions of the definition.⁶⁰

In *S.H. Maini V M/s Carona Sahu Co Ltd*⁶¹ the same principle was upheld that a shop manager having administrative functions though occasionally doing clerical job was not a workman. It is the principal or major duty performed by the employee which determines the employee's real status. The nomenclature of the post is also irrelevant. Our Supreme Court has not been lagging behind in explaining and evolving the exposition of the law, wherever it finds an opportunity.

The confusion about the seasonal workers regarding their regularisation, application of the standing orders to their case and grant of other benefits to them has been cleared by the

60 Ibid at 2611-12

61 AIR 1994 SC 1824

Supreme Court in Maharashtra State Cooperative Cotton Growers Marketing Federation Ltd V Maharashtra State Cooperative Cotton Growers Marketing Federation Employees Union⁶² In this case, the

Cooperative Federation had Temporary perennial and seasonal employees Perennial employees were 2200 and seasonal employees were 4500 in numbers The dispute arose to make seasonal employees permanent if they have worked more than 240 days The matter was referred to the tribunal and the tribunal awarded permanency to such employees who had put in more than 240 days of service On appeal, the High Court also directed to treat even seasonal employees as permanent if they have completed 240 days of working or more

A previous decision of the Supreme Court - MS Coop CGMF Ltd V Sripati Pandurang Khade⁶³ also decided that the seasonal employees were to be treated as permanent if they have put 240 days or more of service Model standing order of the Federation No 4-B, also required that employees who have put in 240 or more days of service should be made permanent The Supreme Court in deciding this case held the case of Pandurang Khade⁶⁴ per incuriam, set aside the direction of the High Court holding Model standing orders to be applicable to perennial employees not to seasonal employees who are governed by their own service conditions and as such seasonal employees putting more than 240 days of work were not entitled to be regularised and made permanent perennial employees The Supreme

62. AIR 1994 SC 1046

63 AIR 1989 SC 485

64 id

Court in this case pointed that -

" There is a difference between seasonal employment and seasonal employees. The employment which are only seasonal may require only seasonal employees and there are no perennial employees on their staff. On the other hand an employment may have both perennial and seasonal work as in the present case hence require both kinds of workmen. Further, seasonal employees may be permanent and Temporary. The Permanent employees are employed from season to season successively and are entitled on that account for retention allowance and all other allowances referred to above during the off season because of their permanency as seasonal employees which is different from permanency as perennial employees. The Temporary seasonal employees are not obviously entitled to the said benefits as the permanent seasonal employees since the temporary employees are not engaged from season to season but only when there is an increase in work. There are also part time seasonal employees and they carry different scales of wages by the very nature of their employment as pointed out above. We have to stress this aspect because we find that there is a good deal of confusion by the Tribunal and the Courts below on these aspects of the matter. This has contributed to their erroneous conclusions. 05

IV. Wages Wages is the recompense received by the workman in return to his labour. It forms the major portion of the cost of production as well. Naturally employer for increasing his quantum of profit, is always interested to reduce the components of cost and wages being one of that he always tries to minimise its quantum. While on the other hand, the workman's existence depends on the amount, certainty and punctuality of the payment of wages so naturally, he always tries to enhance its quantum. Thus the tussle is perennial. The state on its part has enacted the Payment of Wages Act 1936 the Minimum Wages Act 1948 and in Uttar Pradesh the U P Industrial Peace (Timely Payment of

wages) Act, 1978 The last Act in U.P. ensures payment of wages to the workers as a lot when an establishment fails to pay and the wage-bill is above 50,000/- In Modi Industries Ltd V State of U.P.,⁶⁶ on the complaint of non payment the Labour Commissioner was to issue necessary certificate to activate the District Magistrate to realise the sum of wages from the employers as arrears of revenue with 10 percent recovery charges and place the amount so realised before the Labour Commissioner for disbursement among the workers In this case it was decided that the Labour Commissioner should issue certificate of recovery through a speaking order giving reasons for the same

The component and object of wages decide whether it is a Minimum a Fair or a Living wage The findings of Labour Appellate Tribunal in Phattan Sugar Mills V Their workmen⁶⁷ that the minimum wages not only includes the bare physical necessities of the workman and his family but also the modicum of efforts otherwise known as conventional necessities, was again recognised by the Supreme Court in Crown Aluminium works V Their workmen⁶⁸ In this case the court emphasised that, there is however one principle which admits of no exceptions No industry has a right to exist unless it is able to pay its workmen atleast a bare minimum wage The capacity to pay the minimum wage will not be compromised with the existence of the industry⁶⁹ The minimum wages should be fixed in the scheduled

66 AIR 1994 SC 536

67 (1954) 111 LLJ 341

68 AIR 1958 SC 30

69 Express News Papers Ltd V Union of India, AIR 1958 SC 578 Lipton Ltd V Their workmen, AIR 1959 SC 67

industries with the dual object of providing sustenance and maintenance of workers and their family and preserving their efficiency as a worker and for this purpose, consideration of capacity of industry to pay was irrelevant.⁷⁰ To enable the fixation of wages above the minimum wages 'industry cum region formula' was evolved whereby the financial capacity of the employer and the prevailing rate of wages in similar concerns in the region was taken as a basis.⁷¹

In Management of Kirlampundi Sugar Mills V Industrial Tribunal⁷² the Supreme Court refused to grant any enhancement in wages as the unit had no financial capacity to bear the burden of new wage structure while applying the 'industry cum region formula', taking care of not only the interest of the workers but also the unit concerned and the industry as a whole. In Hindustan Antibiotic Ltd V Their workmen⁷³ the submission that Public sector units should not be compared with Private sector units in applying 'industry cum region formula' regarding wage fixation was rejected by the Supreme Court and it was allowed to be applicable with equal force to both types of the units.⁷⁴

70 Unichoyi V State of Kerala (AIR 1962 SC 12) C.B Boarding and Lodging V St of Mysore (AIR 1970 SC 2042)

71 Novex Dry cleaners V Its workmen (1962) 1 LLJ 271 French Motor Car Co Ltd V Their workmen AIR 1963 SC 1327 Greeves Cotton & Co V Their workmen AIR 1964 SC 680.

72 1972 (1) SCR 428.

73 AIR 1967 SC 948.

74 Unichem Lab Ltd V Their workmen AIR 1972 SC 2332

In workmen Madala Factory of the Indian Hume Pipe Co Ltd
V The Indian Hume Pipe Co Ltd ⁷⁵ The Supreme Court held that the
 wage structure of workmen should normally not be revised to their
 prejudice

Recently, in deciding the contents of wages, the Supreme
 Court in Wellman (India) Pvt Ltd / Employees State Insurance
Corporation ⁷⁶ held that 'Attendance Bonus', payable under a
 settlement is wages

Thus the fixation of wages has been properly taken care of
 by our courts. Still there are variations in its components in
 different places and industries. The quantum of wages also decides
 the status of a person whether he is a workman or not. There should
 be as far as possible uniformity in the contents
 of wages and it should be delinked for determining the status of
 a person. Every person who works in the production, distribution,
 sales or service unit of a concern should be treated as workman
 barring a few who are distinct with their managerial assignments.

V Trade Union-freedom of Association and Strikes — In early days
 of Trade Union activity, the employers treated these activities
 as an infringement of their right to carry on business and workers
 were legally liable for such activities civilly and criminally as
 well. After the passing of the Trade Unions Act 1926 the workers
 were accorded rights to form their unions and carry on their
 legitimate trade union activities. After independence the
 constitution accorded this right as a fundamental right under

75 AIR 1986 SC 1794

76 AIR 1994 SC 1037

Article 19 (1) (c) as the attribute of democratic set up of Indian Society Right to form an association also includes a right not to form an association

In *Tikaramji V State of U.P.*,⁷⁷ the Supreme Court has pointed out —

" Assuming that the right to form an association implies a right not to form an association it does not follow that the negative right must also be regarded as a fundamental right. The citizens of India have many rights which have not been given the sanctity of fundamental rights, and there is nothing absurd or uncommon if the positive right alone is made a fundamental right "

In *Bal Kotalah V Union of India*⁷⁸, the Supreme Court held that —

" the appellants have no doubt a fundamental right to form association under Article 19 (1) (c), but they have no fundamental right to be continued in employment by the state and when their services are terminated by the state they cannot complain of the infringement of any of the constitutional rights when no question of violation of Article 311 arises"

in the case where government servants association asserted that right under Article 19 (1) (c) to form an association includes the right to be recognised by the government of such an association this assertion was rejected by the Supreme Court⁷⁹ Though right to form an association was upheld⁸⁰ Freedom to form an association does not include in its ambit the right to resort to 'strike' or 'Lockout',⁸¹

77 AIP 1956 SC 676

78 AIR 1958 SC 232

79 *Raghubar V Union of India*, AIR 1962 SC 263

80 *O K. Ghosh V Joseph* AIR 1963 SC 812

81 *All India Bank Employees Association V National Industrial Tribunal* AIP 1962 SC 171

In Rohas Industries Staff Union V State of Bihar⁸² the question for determination was whether the employers have any right to claim damages against the employees participating in an illegal strike and thereby causing loss of production and business. Rejecting the claim of the employers the court held that -

' It is true that section 24 of the Industrial Disputes Act 1947 imposes a statutory duty on the employees not to commence or declare an illegal strike. But it is manifest that if there is a breach of this statutory duty on the part of the employees the employer has no right of civil action against the employees in default apart from the statutory penalty provided by section 26 (1) of the Industrial Disputes Act, 1947' ⁸³

In this case the court further held that the striking workmen are not prevented from taking recourse to the protection of section 18 of the Trade Union Act 1926 mainly because the strike is illegal under section 24 (1) of the Industrial Disputes Act, 1947

In Gujarat Steel Tubes Ltd V Gujarat Steel Tubes Mazdoor Sabha⁸⁴ it was held by the apex court that -

" Even if a strike be illegal it cannot be castigated as unjustified unless the reasons for it are entirely perverse or unreasonable, an aspect which has to be decided on the facts and circumstances of each case " ⁸⁵

The finding of the arbitrator in this case, that dismissal for passive participation in the illegal and unjustified strike by not reporting for duty was appropriate was overruled by the apex court.

⁸² AIR 1963 Pat 170

⁸³ ibid at 172.

⁸⁴ (1 80) 1 Lab LJ 137 (SC)

⁸⁵ ibid at 168

Recognising the importance of Trade unions as well as the worker's right to strike for just cause, the Supreme Court has observed in B.R.Singh V Union of India,⁸⁶ that —

" The necessity to form unions is obviously for voicing the demands and grievances of labour. Trade unionists act as mouth pieces of labour. The strength of a Trade-Union depends on its membership. Therefore, trade unions with sufficient membership strength are able to bargain more effectively with the management. This bargaining power would be considerably reduced if it is not permitted to demonstrate. Strike in a given situation is only a form of demonstration, e g go-slow, sit in, work to rule, absenteeism etc , and strike is one such mode of demonstration by workers for their rights. The right to demonstrate and, therefore, the right to strike is an important weapon in the armoury of the workers "87

Earlier, the Supreme Court held that in case of a legal strike, the workers are entitled to wages for the strike period also. In Churakulam Tea Estate V Their workmen,⁸⁸ it was held that in case of a strike which is legal and justified, the workman will be entitled to full wages for the strike period. Similar view was taken by the Supreme Court in Crompton Greaves Ltd V Its workmen⁸⁹

But recently the Supreme Court in Bank of India V T.S.Kelawala⁹⁰ held that the workers are not entitled to wages for the strike period. The Supreme Court in this case observed that —

" The legality of strike does not always exempt the employees from the deduction of their salaries for the period of strike "91

It was also held in this case, that —

" whether the strike is legal or illegal, the workers are liable to lose wages for the

86 AIR 1990 SC 1

87 ibid at 5

88. AIR (1969) SC 998

89 1978 Lab IC 1379 (SC) .

90 1990 Lab IC 39 (SC) connected appeal with S.U.Motors (P) Ltd V Their workmen,

91 ibid

period of strike The liability to lose wages does not either make the strike illegal as a weapon or deprive the workers of it "92

This judgement of the Supreme Court recognises the workers right to strike but refuses, at the same time, wages for strike period irrespective of its legality and justifiability

The Madras High Court in State Banks' Staff Union V State Bank of India⁹³ followed this Judgement of the Supreme Court and held that strike whether justified and legal or not, employer would be entitled to deduct salary of employees for the strike days on principle of 'no work no pay'

The recent trend of judgements by the Supreme Court and High Court has hit hard at the very root of the right to strike won by workers through prolonged struggles ⁹⁴ M.Anjanevulu observes —

" The workers must have the right to strike for the redressal of their grievances and they must be paid wages for the strike period when the strike is legal and justified Further, they must also be paid atleast half for the strike period when strike is illegal and justified Illegality of strikes may be mere non-observance of statutory provision of the Act (Industrial Disputes Act, 1947) but situation reasonably warrants the workers to go on strike."95

M.Anjanevulu further observes that in view of the earlier decisions of the Supreme Court, the decision of the Supreme Court in Bank of India V T S Kelawala's⁹⁶ case deserved reconsideration But from employers point of view,

92 ibid

93. 1991 Lab IC 197 (Mad).

94 M.Anjanevulu : 'Right to strike and wages', 1991 Lab IC 133

95 ibid.

96 Supra Note 90.

this decision is likely to discourage strikes and 'goslow' and would bring discipline in Industry⁹⁷

VI Retrenchment : The expression 'retrenchment' has been the focal point of controversy in the recent years because of varied interpretation given by the Courts. This expression has been defined by section 2 (oo) of the Industrial Disputes Act, 1947, and in it by an amendment (Act No 49 of 1984) a new clause (bb) has been added to remove certain misconceptions which arose because of varied interpretations of the term by the Supreme Court.

In the early days, the Supreme Court in the case of Pipariah Sugar Mills Ltd V Pipariah Sugar Mills Mazdoor Union⁹⁸ and Barsi Light Railway Co V K.N.Joglekar and others⁹⁹ had observed that the retrenchment indicates in its ordinary acceptation that the business itself is being continued but a portion of the staff or the labour force is discharged as surplus. It propounded a no fault theory or surplusage theory of termination whereby a surplus labour force is retrenched, business continues and in future employment those retrenched workers may get a preference, and meanwhile all procedures for retrenchment to be followed, compensation to be given and in case of any anomaly, the worker deemed to be in service and to be reinstated with full back wages.

97 Dr. Srivastava Suresh C 'Deduction of Full days wages for Absence or Part of the day. A critique of Bank of India case' 33 JILI (1991) 418 at 428

98 AIR 1957 SC 95

99 AIR 1957 SC 121 connected Appeal of Hari Prasad Shiv Shanker Shukla v A.D. Divilkar

The above legal position continued upto 1976, as cases decided¹⁰⁰ by the Supreme Court during this period contained the above ratio and a distinction was maintained between Termination - Simpliciter (i.e. under the standing orders) and termination as surplusage (i.e. retrenchment).

The trend changed from State Bank of India V N.Sunder money¹⁰¹ where the expression retrenchment was given a very wide connotation and 'termination for any reason whatsoever' was regarded as the key words and as such whatever the reason, "every termination spell retrenchment" was the finding of the Supreme Court. The surplusage theory was discarded. The term 'retrenchment' by now began to include not merely the act of termination by the employer but also the fact of termination howsoever produced.

'Retrenchment' is one of the modes of termination of service. Termination of service may be brought about by dismissal, discharge, removal from service or even retrenchment apart from resignation or voluntary retirement.¹⁰² Thus every termination of service was not retrenchment but every retrenchment was a termination of service. Now, after Sunder money¹⁰³ every termination of service is retrenchment. And if the procedure of retrenchment and due

100 Bangalore Woollen, Cotton and Silk Co. Ltd. V Its workmen (AIR 1962 SC 1363) Ankapalli Cooperative Agriculture and Industrial society V its workmen (AIR 1963 SC 1489) Digwa Colliery V Their workmen (AIR 1966 SC 75) and Wellcox Buckwell (India) Ltd. V Jagamath AIR 1974 SC 1166 etc.

101 AIR 1976 SC 1111.

102. Avon service production Agencies (P) Ltd. V Industrial Tribunal (1979) 1 Lab LJ 1 at 7 (SC)

103 Supra Note 101.

compensation is not complied with, the termination will stand at naught and the employee will be reinstated with full back wages

In Sunder money termination of a temporary workman employed only for a certain number of days under the contract of employment constituted retrenchment. Similarly in M/s Hindustan Steel Ltd v Presiding Officer, Labour Court,¹⁰⁴ on the expiry of the period mentioned in the appointment order, the renewal of their contract of service was not made, neither any order of Termination of their services was issued on the plea that the termination was automatic on the expiry of the contractual period and since no order of termination has been passed by the employer it did not amount to retrenchment. But the court held it to be retrenchment.

Again in Delhi cloth and general Mills Ltd v Shambhu Nath Mukerjee¹⁰⁵ where the name of a workman was struck off from the rolls for absence for eight consecutive days, the court held it to be a case of retrenchment. 'Termination simpliciter' if authorised by the standing orders was not appreciated. In the series of such cases, Santosh Gupta v State Bank of Patiala¹⁰⁶ is worth mentioning, here the services of a workman (a woman who had put in more than 240 days in a year) were terminated for her failure to pass confirmation test. The court held it to be a case of retrenchment.

In Mohan Lal v Management, Bharat Electronics Ltd¹⁰⁷ where the services of the appellant were terminated during the extended period of probation because it was unsatisfactory even

104 AIR 1977 SC 31

105 AIR 1978 SC 8

106. AIR 1980 SC 1519

107 (1981) Lab IC 806

this was held by the court to be a case of retrenchment In Avon Services (Production Agencies) Pvt²Ltd V Industrial Tribunal¹⁰⁸, the difference between a termination out of retrenchment i e termination of surplus labour while the concern is going on and the termination out of closure was clarified by distinguishing the provisions of Section 25F and Section 25 FFF of the Industrial Disputes Act 1947 ¹⁰⁹

In L Robert D'Souza V Executive Engineer¹¹⁰, a casual labour of railways who had worked for 26 years as such demanded benefits granted by the central pay commission to his category as well and resorted to a hunger strike for the same The Railways terminated his services on the ground of unauthorised absence Kerala High Court regarded this termination not a retrenchment On appeal, the Supreme Court reiterating its earlier view right from sunder money, held it to be a retrenchment

The trend of wide interpretation to include every termination in retrenchment continues In R Sreenivas Rao V Labour Court Hyderabad¹¹¹, discontinuance of casual labour on daily wages from 3rd Aug 1984 till Dec 1984 was treated as retrenchment under section 2 (00) of the Industrial Disputes Act 1947 The Court held -

108 (1979) 1 Lab LJ 1 (SC)

109 See 25F Prohibits retrenchment until the conditions prescribed in the section are fulfilled By Section 25 FFF termination of employment on closure of the undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice is not prohibited Payment of compensation and payment of wages for the period of notice are not, therefore conditions precedent to closure (id at 8)

110 (1982) 1 Lab LJ 330 (SC)

111 (1990) 11 LLJ 577 (AP)

" AS there is no dispute that they have the required number of days of service continuous as defined in section 25B and that the provisions of section 25F are not complied with, the petitioner will be entitled to Reinstatement "

Again in Punjab Land Development and Reclamation Corp Ltd etc. etc V Presiding Officer Labour Court Chandigarh etc etc,¹¹² the Supreme Court reiterated —

" We hold that retrenchment means the termination by the employer of the services of a workman for any reason whatsoever except those expressly included in the section "¹¹³

In M/s J.K. Cotton Spg and Wvg Mills Co Ltd Kanpur V State of U.P.¹¹⁴ the Supreme Court held where —

" The employee voluntarily tendered his resignation, the High Court was not right in concluding that because the employer accepted the resignation offer voluntarily made by the employee, and terminated the services of the employee, such termination therefore fell within the expression retrenchment rendering him liable to compensate the employee under section 25N. We are also of the view that there was a case of 'Voluntary retirement' within the meaning of the first exception to section 2 (oo) and therefore the grant of compensation under section 25N does not arise. We therefore cannot allow the view of the High Court to stand "¹¹⁵

In Steel Authority of India V Kumari Vandana Singh & others¹¹⁶ it has been held that provisions of section 25F are mandatory and same has to be complied with even if the workman has not passed the test or has not been sponsored by Employment Exchange for regular appointment

112 (1990) 11 LLJ 70 (SC)

113 ibid at 95

114 (1991) 1 LLJ 39 (SC)

115 ibid at 45

116 (1992) 1 LLJ 64 (MP)

In Management of Guest Keen and Williams Ltd v Presiding Officer, Bangalore,¹¹⁷ the question was whether voluntary abandonment of service by remaining absent without leave under standing orders was retrenchment. The Court held that the language of Section 2(oo) is very clear that there should be termination of service by the employer where a workman terminates contract of service by remaining absent without permission. His case cannot be covered under the expression retrenchment. Section 25 F would apply only if workman had worked for 240 days continuously in any year.

In Superintending Engineer Urdhwa Panganga Project circle and Anr/Vavatal Zilla Raste and others¹¹⁸, the court held that Retrenchment not complying with section 25F and 25G of Industrial Dispute Act, 1947 is invalid. Likewise, display of retrenchment notice, on the notice Board of the establishment was treated not a proper compliance of giving of notice to the workman. Further the reason for retrenchment that there was no work was also found untrue. Under these circumstances, the workman was reinstated ~~with~~ with backwages upto the date of decision of the labour court.

It is submitted that the ambit of interpretation 'for any reason whatsoever' occurring in section 2(oo) of the Industrial Disputes Act 1947 is becoming wider and wider leading to results not intended for. The distinction in between termination simpliciter and retrenchment is being wiped out. The legitimate right of an employer to dispense with the services of a worker remains no more as on the plea of non-observance of procedure of

117 (1992) 1 LLJ 846 (Kant)

118 (1993) 1 LLJ 789 (Bom)

retrenchment, the same worker is reinstated with full back wages, when the employer exercises his right to terminate under the standing orders. The Supreme Court regarding rights of the employer has suggested two answers —

" Firstly, those rights (under standing orders and under the contract of employment in respect of the workman whose services have been terminated) may have been affected by introduction of SS 2 (oo) 25F and the other relevant provisions. Secondly, rights which are not affected or taken away but only an additional social obligation has been imposed on the employer so as to give the retrenchment benefits to the affected workman. Looked at from this angle there is implicit a social policy. The will of the people stands in place of a reason."¹¹⁹

To have a proper balance, "for any reason whatsoever" should be confined to the surplus labour only and not to the termination of all kinds for any reason whatsoever.

VII wrongful dismissals and right of reinstatement : A termination of service of a worker becomes wrongful when this act of the employer is whimsical, devoid of natural justice and in breach of contractual obligations and standing orders without observing the procedure prescribed. The result of such a wrongful dismissal turns out in the reinstatement of the worker with full wages or if the circumstances justify that reinstatement would lead to hardship, the worker is awarded compensation for the same.

In Jaswant Singh V Pepsu Roadways Transport Corporation¹²⁰, a passenger bus driver had been dismissed on the ground that he had

119. Supra Note 112 at 94.

120 (1984) Lab IC 7 (SC)

consumed Liquor while on duty The Labour Court found the punishment heavy and uncalled for and ordered reinstatement on appeal Supreme Court held —

" No doubt a driver of a passenger bus or for that matter any mechanically propelled vehicle cannot and should not consume intoxicating liquor while on duty, because this endangers the safety not only of those in the vehicle but those using the road also But where it was only the first offence of the driver the punishment of dismissal was rather heavy and was not called for, the labour court was right in directing reinstatement of the driver in service "

Likewise the Supreme Court issued directions for the reinstatement of a security guard whose services had been terminated by Trade Fair Authority of India without just cause In this case the security guard signed attendance register for some dates, though he was absent on those dates.¹²¹

In Hariganga Security Service Ltd V Member Industrial Court,¹²² it was held that where the termination was found to be illegal, employee would be entitled to full back wages except to money earned as a result of gainful employment

In Baldev Singh V Labour Court Chandigarh¹²³ also the Court found that in the present case the Labour Court as of fact has found that the impugned order of termination was to be adjudged as void and inoperative having been made in contravention of the mandatory provision of section 25F, entitling the workman to the relief of reinstatement The half wages for the period he was out

121 B P Singh V Union of India AIR 1990 SC 1

122 (1991) 11 LLJ 203 (Bom)

123 (1991) 11 LLJ 534 (P & H)

of the job was granted by the labour court. The High Court granted full back wages and reinstatement of the appellant.

In A.G Kher V Atlas Cop.Co (India) Ltd and others ¹²⁴

the services of the appellant was terminated because large number of employees and the union wanted that his services to be terminated. The Court held —

" Removal from service can only be for proved misconduct or unsatisfactory work. Employee cannot be removed from service merely because large number of employees and the union did not approve the presence of the employee in factory. Termination on request of a mob or union would lead to closed shop policy and would suppress freedom for dissent and encourage union bossism " ¹²⁵

The worker in the above case was given all dues past and future and was not reinstated because he had only 3 years for retirement and was out of service for more than 7 years. He was compensated to the tune of Rs 5,81,888/- in lieu of reinstatement.

In Kolhapur Zila Shetkari Vinkari Sahakari Soot Girini Ltd V Ram Chandra Shanker Shinde and another, ¹²⁶ the charge against the employee was that he assaulted co-employee at ESI hospital and was punished with dismissal. The Labour Court set aside the dismissal order. On Appeal, the High Court held —

" That because the occurrence did not take place within the premises of the factory but outside, it is not subversive of discipline. Fight between co-employees outside establishment does not by itself constitute an act of indiscipline " ¹²⁷

The worker was reinstated with full back wages.

124 (1992) 1 LLJ 423 (Bom.)

125. *ibid* at 425.

126 (1992) 1 LLJ 435 (Bom.).

127 *ibid* at 437

In Central Cooperative consumer stores Ltd V Labour Court Himachal Pradesh at Simla¹²⁸, the employee was reinstated with backwages but this was contested by the employers for 20 years before various authorities without success. On appeal Supreme Court refused to interfere with High Courts order of reinstatement with backwages. The society was permitted by the Supreme Court to replenish itself by recovering the amount to be so paid from the salary of concerned officers.

In Union of India V Giriraj Sharma,¹²⁹ the dismissal of the employee merely on the ground of overstaying leave period was set aside because Supreme Court found the punishment harsh and disproportionate to the guilt.

The cases discussed above show the concern of the Supreme Court and High Courts in maintaining the balance of Employer's right of taking action against the delinquent employee and the social security and norms of a democratic developing society. But the law in case of violation of natural justice, loss of confidence of the employer and industrial accidents needs further exposition, as far as industrial employment is concerned. Since aftermath of accidents lead to some palliative, welfare and social security type of actions this term will be discussed under the heading of social security and law of industrial employment.

128 AIP 1994 SC 23

129 AIR 1994 SC 215

C Concepts : i) Natural Justice and the Law of Industrial Employment

The Supreme Court has in a number of cases emphasised upon the observance of principles of natural justice. In Board of Trustees of the Port of Bombay V Dilip Kumar Radhavendarao Nadkar,¹³⁰ the Supreme Court held that in a domestic enquiry which is a quasi-judicial function the natural justice and fair play must form the basis of any conclusion. Further, denial of assistance of a legally trained person to the delinquent employee in face of an employer who is assisted by a legally trained person is denial of natural justice.

"Natural justice", said Lord Esher, "is the natural sense of what is right and wrong."¹³¹ Although natural justice is wide and vague term most of the cases in which it is used is a flexible, pragmatic and relative concept not a rigid ritualistic or sophisticated abstraction. It is not a bull in China Shop or a bee in one's bonnet.¹³²

The Anglo American have actively applied two principles of natural justice.¹³³

I Nemo Judex in causa sua No one should be made a judge in his own cause, or the rule against bias ;

130 (1983) 1 Lab LJ 1 (SC)

131. R.H.Graveson 'The Conflict of Laws' (3rd Ed 1955) p 478

132 Justice Krishna Iyer in Mohinder Singh Gill V Chief Election Commissioner (1978) 1 SCC 405 at 434 See V.G.Ramachandran, 'The Law of Writs' 3rd ed, 1986 p 276

133 Robinson V Fenner (1931) 3 KB 835; See also Graveson's 'The Conflict of Laws' 3rd ed (1955) p 478.

II Audi Alteram Partem Hear the other party or the rule that no one should be condemned unheard The principles of natural justice have gained importance because either in private or public dealings these principles are becoming relevant to control the maladministration to give justice to the aggrieved party ¹³⁴

In *K Lakshmanan V Government of Tamil Nadu & others*¹³⁵, the court held that if an Appellate Authority issues show cause notice proposing to enhance punishment importing personal knowledge while deciding appeal and makes an order of enhancement of punishment, the order is vitiated It further held that reliance placed on witnesses statement recorded under section 161 Cr P.C. without furnishing copies of statements to the employee even without marking them in appeal proceedings vitiates order enhancing punishment

In *R Govindaraj V Govt tool Room and Training Centre*¹³⁶ and others, two s eparate inquiries were setup against two employees in the same case and inquiry material of one was used against the other without holding any material inquiry against that other Relying on the observations of Supreme Court, in *Associated Cement Co Ltd V Their workmen*¹³⁷, the court held —

" It would have been an entirely different matter if the authorities had chosen to hold a joint

134 Dr. R. R. Dubey Changing Dimensions of Natural Justice, 1995 (VIII) CILQ p 27

135 (1992) 1 LLJ 380 (Mad)

136 (1992) 1 LLJ 597 (Kant)

137 (1963) 11 LLJ 396 (SC)

enquiry against both the petitioner and Badrinath as the incident which gave rise to a departmental inquiry was one and the same. But the management choose to hold two separate inquiries, therefore it is clear that the witness examined in one enquiry cannot be regarded as witness examined in another enquiry. It violates rules of Natural Justice."¹³⁸

Again in D.K. Yadava V JMI Industries¹³⁹ the Supreme Court held that if any employer terminates the services of any worker without observing the principles of natural justice, it would be violation of Article 21 as it will infringe the right of livelihood guaranteed as right to life under Article 21 of the constitution. Even if Industrial Employment (Standing Orders) Act, 1946 or certified standing order under it permits and empowers such a termination (e.g. absence of 8 days deemed to be renouncing of the job), the lack of following of the proper procedure under the principles of natural justice containing fairness, justice and reasonableness will lead to a void action.¹⁴⁰

C (ii) Loss of Confidence and the Law of Industrial Employment :

Employers sometimes raise the plea of loss of confidence while terminating the services of an employee where an employee's services are terminated on the plea of lack of confidence against the employee, it was found that it amounts to casting a stigma on his character. In the case of employees protected by Article 311, the proper procedure of termination must be observed even after losing the confidence in the employee and if it is not so, the termination is bad.¹⁴¹ But in case of industrial workers, by allowing compensation

¹³⁸ Supra Note 136 at 599.

¹³⁹. (1933) 2 SC C 259

¹⁴⁰ Ibid

¹⁴¹ Kamal Kishore V Management of M/s Pan American World Airways (AIR 1987 SC 229).

just as in Chandu Lal V M/s Pan American world Airways¹⁴² wherein the Supreme Court upheld that the workers must go if they have lost the confidence of the employer¹⁴³ and the termination was approved. In Chemdhalal's case the appellants were terminated for indulging in smuggling activities. The termination was lacking procedural formalities but instead of reinstating them they were awarded compensation which they refused.

In R D Verma V Industrial Court at Indore¹⁴⁴ the court held that plea of loss of confidence must be bonafide and proved to contain its misuse. In Hindustan Aeronautics Ltd V State of U P. and others¹⁴⁵ the Court held that pleading of loss of confidence perfunctorily without factual foundation is not a tenable ground for terminating the services of an employee. Again the same High Court in Sadhan Sahakari Samiti Basantpur Ltd V Presiding Officer Labour Court¹⁴⁶ held that loss of confidence against the worker may result in denial or relief of reinstatement so loss of confidence must be founded on material facts and particulars specifically pleaded and proved.

It is submitted that an employee in whom the employer has lost confidence must not be thrust upon to continue because of lack of

142 (1985) 1 LLJ 181 (SC)

143 See Assam Oil Co V Its workmen (1960) 1 LLJ 587 (SC)
Hindustan Ste 1 Ltd V ATK Roy (1962) 1 LLJ 228 (SC)
Ruby General Insurance Co V P P Chopra (1970) 1 LLJ 63
 (SC) Birry Ltd V Their workmen (1973) Lab IC 1119 (SC) etc

144 (1991) 11 LLJ 488 (MP)

145 (1993) 11 LLJ 340 (All)

146 (1993) 11 LLJ 468 (All d)

procedural formalities while he was terminated provided the plea of loss of confidence is genuine and bonafide. It is a matter of pleasure that courts are doing this. Though in *H B Prabhu V Oriental Bank of Commerce* ¹⁴⁷ the Delhi High Court observed —

“ where the order of termination of service was passed against a Bank employee without holding any enquiry and the order was based on loss of confidence by the management, the order Terminating his services would be vitiated as it casts stigma on him and therefore he would be entitled to be reinstated in service with full back wages and all other consequential benefits ” ¹⁴⁸

D Social Security and Law of Industrial Employment

a) Industrial Accidents and Social Security :

The effect[†] of industrial accidents on the law of industrial employment warrants some exposition. Industrial accidents may broadly be divided in two categories one which affect the people at large outside the factory premises as well just like Bhopal gas leak incident¹⁴⁹ and secondly the accidents which confine the factory precincts and affect the workers only. The Accidents which occur within the factory cause either injury or death to the workers. The stereotyped defence of the employer in cases of accidents to evade the responsibilities of after care of the workers, is confined to the pleas of contributory negligence of the workers, accident not out of and in the course of employment or occurrence was outside the premises of the factory or the worker did not observe the prescribed safety rules or appliances. The compensation and suitable absorption in

147 (1991) Lab IC 1954 (Delhi)

148 Ibid

149 See *M C Mehta Vs Union of India* (1987) 1 SCC 395 where through a settlement compensation was granted to victims through *Union carbide Corporation V Union of India* AIR 1992 SC 248

employment is the legal remedy available to the workers. The Workmen's Compensation Act, 1923 is the guide to resolve the disputes after the accident, between the worker and the employer. The expression "arising out of" suggests the cause of accident and the expression "in the course of" points out to the place and circumstances under which the accident takes place and the time when it occurred.¹⁵⁰ A causal connection or association between the injury by accident and the employment is necessary. It was held in M/s Chowgule and Co Pvt Ltd V Smt Felicidade,¹⁵¹ that ~~onus~~ is on the claimant to prove that accident arose out of and in the course of employment.

In Trustees of Port of Bombay V Srimati Yamuna Bai¹⁵²
Because of a bomb explosion placed in the premises of the workshop, a workman died. It was held that the workman was not responsible for placing of the bomb and the injury due to its explosion was caused at the time and place at which he was employed. Therefore the injury was the result of an accident arising out of his employment.

In Director (T & M), D N K Project V Smt D Buchitalli,¹⁵³
a factory worker worked for four hours inside the factory premises and while he was coming out of the factory, he sweated profusely and by the time he was taken to hospital, he was found dead. A claim contending the death of the worker out of and in the course of employment, was preferred.

150 S N Misra : 'Labour and Industrial Laws' Twelfth Edition, Allahabad, 1988, p 42.

151 AIR 1970 Goa 127

152 AIR 1952 Bom 382.

153 1989 1 LLJ 259 (Orissa)

The court interpreting section 3 (1)¹⁵⁴ of the workman's Compensation Act, 1923, liberally, admitted the plea raised by the dependants of the deceased and held that the stress and strain of four hours of work inside the factory premises must be taken to be an accelerating factor to death and therefore the employer is liable to pay compensation inspite of the fact that the deceased was a heart patient

Gujarat High Court recently in Sakina Bibi V Gujarat S.R T. Corp. Ahmedabad¹⁵⁵ awarded compensation to the widow of the deceased who was a driver of State Road Transport bus. He was suffering from headache, died in the cabin while driving the vehicle when he had to apply brakes suddenly to save a child. Medical examination revealed that sudden application of brakes caused high blood pressure and rupture of blood vessels, causing ultimately the death of the workman. The Court held —

" Ordinarily, a driver, while applying brake, would not undergo such stress and tension culminating into rupture of aneurism. But a person who was suffering from headache, while driving a vehicle like bus, had to, all of a sudden apply brake, would definitely lead to higher degree of tension and stress and if aneurism gets burst, causing fatal injury, it could safely be said to have been caused out of employment."¹⁵⁶

In Raj Dulari V Superintending Engineer P.S.E.B.,¹⁵⁷ a work charge employee under the Punjab State Electricity Board was

154. Section 3 (1), as far as relevant is extracted hereunder —

"If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this chapter "

155 (1992) Lab IC 365 (Guj)

156 ibid p 366

157 (1989) 11 LLJ 133 (P & H) .

engaged in fixing electric wire on the poles on either side of the Road. A government bus came at a high speed and dragged the electric wires hanging on the road with the result the pole on which he was working was broken from the middle and he fell down and died instantaneously. The claim made by the widow was rejected by the Commissioner on the ground that the employee worked beyond the duty hours at his own risk and therefore the death was not in the course of employment. Rejecting the above finding, the High Court held —

“ If the work had been left at the spot as it was, the result would have been that the wires would have been on the roads causing much more damages. By asking the employee to continue the work even beyond the duty hours, The Assistant Lineman acted with responsibility. If a workman continues to work whether upto the duty hours or beyond on a job directed by his superiors, he continues to be on duty and in the course of his employment. Therefore, the deceased was on duty on the course of his employment when the accident took place, and his widow is entitled to compensation.”¹⁵⁹

The notional extension of employers premises theory which was initially evolved by British Courts and was later accepted and applied by the Indian Court enhances the scope of the term 'in the course of employment.'

In Sri Jayaram Motor Service V Pitchammal¹⁵⁹ the Court with respect to this theory made the following observation —

“ As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he left the place of employment, being excluded, it is now well settled, that this is subject to the employer's premises so as to include an area through which the work man passes and repasses in going to and coming from the actual place of work. There may be reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached his employer's premises and

¹⁵⁹. Ibid.

¹⁵⁹. 1982 Lab 1 NOC 84(Mad).’

and vice-versa" 160

Exception to this rule is when the place of accident happens to be a public place and the risk faced by the workman is not due to his employment but to his being on the spot as a member of the public. The employer will be liable to pay compensation only if the presence of the workman on the spot can be found traceable to an obligation imposed upon him by the employer 161

In S.S. Mafg. Co V Bai Valu Raja 161a a workman employed in a salt works while returning home after finishing his work had to go by a public path then through a sandy area in the open public and finally across a creek through a ferry boat. The workman while crossing the creek in a public ferry boat which capsized due to bad weather was drowned. It was held that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. The proximity of place of accident to the place of work is irrelevant for this purpose.

In Chaitram / Steel Authority of India Ltd Bhilai 162 the worker suffered an injury on his left eye while he was breaking Dolomite stone for cleaning the surface of the mine, a flying chip of the mineral struck his left eye and got stuck in his pupil. The worker claimed a compensation which was objected to by the employer.

160 ibid see also Works Manager, Carriage and Wagon Shops EIR V Mahabir AIR 1954 All 132

161 Works Manager Carriage & Wagon Shop EIR V Mahabir AIR 1954 All 132

161a S S Manufacturing Co V Bai Valu Raja AIR 1958 SC 881

162 (1991) 11 LLJ 144 (MP)

on the ground that the worker did not use goggles which he had to use while working as per standing orders and instructions. Rejecting the contention of the employer, the High Court observed

' The Act is welfare legislation and therefore procedural technicalities should not be permitted to defeat justice. Burden of proving intentional disobedience on the part of the employee would be on the employer who claims the benefit of the provision. In such a situation, it was the obligation of the employer to prove that the difficulty expressed by the employee in using goggles while cleaning the surface was not real but fake. It is not established that the employee was not using the goggles intentionally and in wilful disobedience of the orders. Therefore the employer is liable to pay compensation "163

In Juthi Devi Vs M/s Pine Chemicals Ltd.¹⁶⁴ a chowkidar, employed through a contractor to work as a security guard died due to heavy machines lying in the premises falling over him. When the legal heirs claimed compensation under the workmen's compensation Act, 1923 the employer objected this claim on the ground that the deceased was employed in a factory which was yet to commence production and hence, he was not a workman under section 2 (1) (n) of the Act. Rejecting this contention of the employer, the High Court observed :

" The workman employed in a premises where manufacturing process is intended to be carried on, is not necessarily required to be actually connected with manufacturing process. Any person engaged in such premises who is contributing for the intended manufacturing process would be deemed to be workman for the purpose of this Act "165

As such Indian judiciary has been quite vibrant and liberal in protecting the interests of workers when they become a victim of an accident

163 ibid

164 (1961) 11 LLJ 386 (J & K)

165 ibid p 387

b) Monetary benefits under the social security

while the worker remains in employment, he is given Dearness Allowance and Bonus. After his retirement he gets Gratuity and Provident Fund in lump sum and pension as monthly payment.

- b (1) Dearness Allowance is to neutralise the cost of living due to rising prices. A separate D.A. is allowed to wage earner without revising their wages in India. The quantity of D.A. is different for different level of wages. Full neutralisation is not given lest it will increase inflation wages - awards. Pay Commissions formulate the modality of its fixation and payment.

In Bengal Chemical⁵ and Pharmaceutical works v its workmen ¹⁶⁶ the Supreme Court reviewed all decided cases and formulated the following principles for deciding a claim for fixation or revision of dearness allowance :

- i) Full neutralisation is normally not permitted except to the lowest rung of the employees.
- ii) The purpose of D.A. being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and decrease on a fall in the cost of living ;

- (iii) Basis of fixation of wages and dearness allowance should be industry cum region
- (iv) Employees getting the same wages should get the same D.A. irrespective of whether they are working as clerks or members of subordinate staff or factory workman and
- (v) The additional financial burden which a revision of the wage structure or D.A. should impose upon the employer and his ability to bear such burden are very material and relevant factors to be taken into account

In the later cases,¹⁶⁷ these principles were approved by the Supreme Court

- b (ii) Bonus Since labourers contribute equally to the prosperity and ~~and~~ profits of a concern, it is legitimate that they should get something from that profits over and above their routine wages which is generally short of a living wage. The Payment of Bonus Act, 1965 was passed after a tremendous struggle by the workers, making payment of bonus on profit sharing concept and fixing the minimum bonus as obligatory

In Jalan Trading Co V Mill Mazdoor Sabha,¹⁶⁸ the Payment of Bonus Act was analysed and the following conclusions were arrived at

167 Killick Nixon Ltd V Killick and Allied Companies Employees Union (AIR 1975 SC 1778) Shivraj Fine Arts Litho works V Industrial Court (AIR 1978 SC 1113) Management of Sri Chalthan Vibhag Khand Udyog Sahakari Mandali Ltd V G S Barot and others (AIR 1980 SC 31) British Indian Corporation (India) Ltd V Industrial Tribunal (AIR 1984 SC 362) and workman of M/s Indian Oxygen Ltd V M/s Indian Oxygen Ltd (AIR 1986 SC 125)
In the last case Industry cum region formula was emphasised

168. AIR 1967 SC 691

- i) That it was to impose a statutory liability upon the employer of every establishment covered by the Act to pay bonus to employees in the establishment
- ii) That the formula for payment of bonus should be according to the Act
- iii) That the payment of minimum and maximum bonus may be linked with the scheme of 'setoff and set on'
- iv) That it provided a machinery for enforcement of the liability for the payment of bonus ¹⁶⁹

In Mumbai Kamgar Sabha V Abdul Bhai ¹⁷⁰ the history, object and provisions of the Payment of Bonus Act, 1965 were once again analysed and it was held that the Act was a whole code on profit bonus and did not include other bonuses which were not based on profits

In Hukum Chand Jute Mills V Second Industrial Tribunal, ¹⁷¹ regarding customary bonus which had quantum in contract but basis in custom the Supreme Court held it to be payable because Bonus Act did not include it and both have a separate field of operation without clash

In Dishergarh power Supply Co Ltd V Its workmen, ¹⁷² the Supreme Court decided that an agreement between the parties to pay more than the minimum (as prescribed by the Act) even when there is no allocable surplus and that agreement being given the shape of

169. id p 695-96

170 AIR 1974 SC 1455

171 AIR 1979 SC 876

172 AIR 1986 SC 1486

an award by the tribunal for the sake of industrial peace, is not legal as it contravenes the Act, hence it permitted only minimum bonus payable as prescribed in the Act

In Workmen of Kettlewell Bullen & Co Ltd V Kettlewell Bullen & Co Ltd,¹⁷³ where the payment of bonus was made at uniform rate for unbroken ten years before Pūja festival irrespective of profit or loss incurred by the concern, it was held to be customary bonus. The judgement of Hukum Chand Jute Mills Ltd V Second Industrial Tribunal¹⁷⁴ was approved by the Supreme Court

Now-a-days productivity linked bonus on adhoc basis according to the performance of the industry during the year concerned is declared annually and each employee getting a certain pay is awarded a bonus irrespective of his nature of duty

- b (iii) Provident Fund : Under the Employees Provident Fund and Misc provision Act 1952, workers are to contribute per month atleast 10 percent of their wages to the provident fund which accumulates with interest either with equal contribution of the employer or without the contribution of the employer in case he allows some more years of engagement in service or agrees for pension and/or gratuity as the case may be, the net result being payment of a lump sum as a provident fund to the employee on his retirement

The employers have challenged the constitutionality of the above Act claiming infringement of their rights. In

173 AIR 1994 SC 1050.

174 Supra Note 171.

Regional Provident Fund Commissioner V Luxmi Ratan Engineering works¹⁷⁵ the validity of Section 5 of the E P F Act 1952 was challenged on the ground that it gave arbitrary and uncontrolled power to the central government to frame any kind of scheme and that Parliament has provided no guidance for the purpose and hence this provision was unconstitutional in view of the Article 14 of the constitution. It was also urged that by making certain contributions by certain employees and the employers compulsory, the Act placed an unreasonable restriction on the factory owners offending Article (19) (1) (g) of the constitution. Rebutting these arguments the High Court held that section 5 of the E P.F. Act, 1952 was not unconstitutional as the Act certainly laid down principles to guide the central government.

Again in Mohammad Ali V Union of India,¹⁷⁶ the Supreme Court had upheld the constitutional validity of section 1 (3) (b) of the Employees Provident Fund Act, 1952. In this case, bringing of Hotels and restaurants under the purview and scope of the Act was challenged as it was contended that power given to the central government under section 1 (3) (b) was unguided.

- b (iv) Likewise, Gratuity is also a lump sum payment which is made to the worker by the employer at the time of retirement or resignation or to the dependants in case of death at the rate of 15 days wages for every completed year of service provided he has worked continuously for 5 years in that establishment except in case of death or disablement.

175 (1962) 11 LLJ 604 (P & H)

176 (1963) 1 LLJ 536 (SC)

In Bakshi Ish Singh V M/s Darshan Engineering Works¹⁷⁷ the Supreme Court held that section 4 (1) (b) of the Gratuity Act, 1972 was not violative of Article 19 (1) (g) of the constitution as section 4 (1) (b)¹⁷⁸ of the Gratuity Act, 1972 provides minimal service conditions which must be made available to the employee not with-standing the financial capacity of the employer to bear the burden

- b (v) Pension to industrial workers in principle is being accepted but has not been introduced in all cases. The controversy that gratuity happens to be a part of Pension has been resolved by the Supreme Court in State of U.P V U.P. University College Pensioners - Association¹⁷⁹. The Supreme Court observed in this case

" we therefore, state either because of what was stated in Jarnail Singh case¹⁸⁰ (where in Gratuity being a part of Pension was held) or the way Pension has been defined by Article 366 (17) of the constitution (Stating Pension to include gratuity), it cannot be held that Pension and gratuity are conceptually the same, as stated in paragraph 9 of Jarnail Singh's case to which our attention is invited "

This court took the view in question in Jarnail Singh because of the definition of the word 'Pension' in the concerned rule (clause (o) of Subrule (1) of Rule 3 of Central Civil Services (Pension) Rules 1972) otherwise what was held in D.V Kapoor V Union of India¹⁸¹ and F.R Jesuratnam V Union of India¹⁸² cases seems to be correct legal position. In the above cases it has been held that gratuity was not a part of pension

¹⁷⁷ AIR 1974 SC 251

¹⁷⁸ Section 4 (1) (b) of the Payment of Gratuity Act, 1972, provides Gratuity to employees on his retirement or resignation after continuous service of 5 years

¹⁷⁹ AIR 1994 SC 2311

¹⁸⁰ Jarnail Singh V Ministry of Home Affairs (1993) 1 SCC 47

¹⁸¹ AIR 1990 SC 1923

¹⁸² 1990 (Supp) SCC 640

C Equal Pay for Equal work The casual workers women workers, part time workers are not paid at par with other permanent workers of the same employer, though they perform the identical nature of work inspite of the provisions in Article 39(d) of the constitution and later on enactment of Equal Remuneration Act, 1976

" It would, therefore, appear that simply because the workers are working on daily rate basis in a Temporary establishment they could not be denied the benefit of principle of 'Equal pay for Equal work' nor the existence of settlement between the union and management can furnish a justification for such discrimination "183

Regarding Equal remuneration Act, 1976, Miss Y Vishnupriya observes "The Act is insufficient and ineffective" 184 This Act, prohibits discrimination in payment where workers are of opposite sex. It does not guarantee equal pay for equal work among the workers of the same sex

In Randhir Singh V Union of India,¹⁸⁵ wherein the Directive Principles of equal pay for equal work was interpreted to cover both men and women by the Supreme Court by observing 'Equal pay for Equal work for everyone and as between the sexes' and read it into the fundamental rights guaranteed by Article 14 securing equality before the law and by Article 16 equality of opportunity in matters of public employment

In D.S.Nakava V Union of India,¹⁸⁶ the principle of Randhir Singh case was affirmed and expanded to give relief to pensioners

183 Dr M.P.Swarnkar "Equal Pay for Equal work A Myth or Reality ' 1988 (1) CLQ 567.

184 Y Vishnupriya "Equal Pay for Equal work in India Myth and Reality" (1991) 1 SCJ 83

185 AIR 1982 SC 879

186 AIR 1983 SC 130

whereby a distinction amongst the pensioners because of retirement before or after a particular date was obliterated. The prohibition of discrimination in payment i.e. affirmation of the principle of 'equal pay for equal work' was followed in the later cases¹⁸⁷ also

In Surinder Singh V Engineer in Chief CPWD¹⁸⁸, the daily wage earner (casual labourers) demanded parity in wages and allowance's with other permanent workers with whom they performed the identical nature of job. The Supreme Court acceded to their demand. Again in State of MP V Promod Bhartiya¹⁸⁹ the Supreme Court held that for equal pay for equal work, similarity of skill, effort and responsibility has to be proved and this burden is on one who complains of discrimination.

Recently in Vijai Kumar and Others V State of Punjab,¹⁹⁰ the Supreme Court held that part time lecturers who are not gainfully employed elsewhere and are working for more hours everyday as compared to regularly appointed lecturers are entitled to minimum of pay scale prescribed for the regular lecturers.

The above principle of 'equal pay for equal work' was found not to be applicable in NFS NFC (Physical Education) Teachers Association Vs Union of India,¹⁹¹ where nature of duties, responsibilities and educational qualifications were different.

187 See Panchandra Iyer V Union of India AIR 1984 SC 541, P Savita V Union of India AIR 1985 SC 1124, Jaipal V Union of India AIR 1988 SC 1504, State of U P V J P Chaurasia AIR 1989 SC 19, Supreme Court Welfare Association V Union of India AIR 1990 SC 334 etc.

188 AIR 1986 SC 584

189 AIR 1993 SC 281

190 AIR 1994 SC 265

191 AIR 1993 SC 369.

Thus the Supreme Court has tried to achieve the goal of social justice by obliterating the discrimination in payment for the same job J K.Mittal rightly observes that "The Randhir Singh verdict, Though cautiously restricted to

" identical work under the same employer" is an excellent example of judicial creativity and has tremendous potential to bring justice to numerous employees who are the real but neglected lot at the base of nation building"¹⁹²

The Financial incapacity of the employer if could be allowed to take a place to pay equal remuneration to both male and female workers the majority of employers will be left outside the purview of the Act ¹⁹³

- d) Workers Participation in Management To bring a feeling of involvement and making workers to realise that the industrial establishment in which they are toiling is their own workers participation in management was mooted The purpose being curbing of strikes and maintaining industrial peace By the Constitution (Forty Second Amendment) Act, 1976, Article 43 A was incorporated stipulating the participation of workers in management Mr Justice A M Ahmadi (now Chief Justice of Supreme Court) states that

" The workers participation in management cannot be meaningful unless their representatives have access to and are informed of the exact state of affairs both factual and financial A fair minded employer must consider it his duty to apprise the representatives of the workers of the correct (as opposed to manipulated) financial position of the establishment without keeping anything back "¹⁹⁴

192 J K.Mittal "Casual Labour and 'Equal Pay for Equal Work' " 28 JLLI (1986) p 261

193 Dr Srivastava Suresh C "Equal Remuneration for Men and Women" 32 JLLI (1990) p 92

194 Justice A M Ahmadi "Sri R Venkataraman Endowment Labour Law Second Lecture" delivered on 26 8 1989 - (1990) 1 LLJ 203

The Judicial response in National Textile workers Union V P R Ram Krishnan Industries¹⁹⁵ was that the workers who supply labour being equally if not more interested in the enterprise, should also be entitled to participate in it. The workers should have a voice or a right to be heard in the determination of the question whether the enterprise should continue to run or be shut down under an order of the court.

Again in Navnit R Kamani V R.R. Kamani¹⁹⁶ the Supreme Court by approving the workers scheme served the cause of workers. In this case a prosperous industrial unit employing 600 workers abruptly closed down rendering these workers jobless for more than two years. Two competing schemes one presented by Ashish Kamani and the other by the workers of the company were placed before the Supreme Court for approval. After a critical examination of the two schemes the court approved the workers scheme modifying the value of equity share to Rs 1/- and directed the transfer of the shares at that price to the employees. The Supreme Court further observed —

" They will have an opportunity to show that workers in New India are capable of managing their own affairs, shaping their own destiny, and building their own future. They will also have an opportunity to establish that when the workers are inspired by an ideal they can produce optimum quantity as also the best quality. Because they would be working for a great cause and working for themselves instead of working for others who often deny to them their legitimate dues and even deprive them of such legitimate dues by appropriating to themselves the fruits of the workers labour. Be it also realised

195 (1983) 1 Lab LJ 45 (SC)

196 AIR 1989 SC 9

that the trade union movement, in the event of the success of this exercise, will be stepping into a new creative phase in the struggle of the working class to assert its identity. The workers must, therefore, ensure the roaring success of this scheme in this noble cause at any cost "197

This judgement for the first time, entrusted the working of an industrial unit to the workers of that unit and reduced and fixed the price of an equity share for Transfer to workers. This Judgement is a Trend setter, a motivator, a morale booster and a confidence builder in the interest of the workers.

In worker of M/s Rohtas Industries Ltd V Rohtas Industries Ltd¹⁹⁸, the Supreme Court directed to revive the reference to the Board for Industrial and Financial Reconstruction established under sick Industrial Companies (Special provision) Act, 1985, with power to enquire into and determine the incidence of sickness in industrial companies and devise suitable remedial measures through appropriate schemes or other proposals and their proper implementation. This case concerned with closure of industrial units manufacturing cement, paper, vanaspati, asbestos and vulcanised fibres owned by Rohtas Industries at Dalmia Nagar Complex in Bihar employing about 10,000 workers.

On the petition against the closure of said units by the workers, the Supreme Court had directed the Central Government to make a reference to the Reconstruction Board whereupon an authorised officer was appointed to look after revival of closed units as per report of the Reconstruction Board. But because of

197 Ibid at 12

198 AIR 1994 SC 2211

Continuing incurring of losses by the units an attempt was also made to sell these units which failed ~~on~~ the present petition by the workers the Supreme Court again directed the Central Government to revive the reference made to the Reconstruction Board and the Board to submit the report to the court

- e) Abolition of Contract Labour : In India, the contract labour system originated to cope with the problem of labour recruitment and labour discipline in early days of industrial revolution and continued till 1970 when contract labour (Regulation and Abolition) Act, 1970 was enacted. The term 'contract labour' probably for the first time has been defined

" contract labour means any person engaged or employed in any premises by or through a contractor with or without the knowledge of the employer in any manufacturing process "199

The Contract Labour (Regulation and Abolition) Act 1970 which was enacted to regulate the employment of all forms of contract labour in certain establishments and to provide for its abolition in certain circumstances, defines 'contract labour' as follows -

" A workman shall be deemed to be employed as contract labour in or inconnection with the work of an establishment when he is hired in or in connection with such work by or through a contractor with or without the knowledge of the principal employer "199a

The worker under the system was exploited by paying daily wages by the contractor without any other fringe benefits which were otherwise payable to regular workers. Many employers continued

199 Section 2 (e) of Beedi and Cigar Workers (condition of Employment) Act, 1966

199a Section 2 (1) (b) of Contract Labour (Regulation and Abolition) Act, 1970

this practice with the sole intention to disown the responsibility from implementing the provisions of social security legislations²⁰⁰

In Hindustan Insecticides Ltd V T N.Jaleel,²⁰¹ where the principal employer paid arrears of contribution in respect of employees employed by the immediate employer (contractor) payment being not made in accordance with the provisions contained in section 42 (2) of Employees State Insurance Act, 1948 the same would not be recoverable by the principal employer under section 41 (1) of the Act when there was no agreement between the principal employer and the immediate employer for recovery of such payment²⁰²

In Calcutta Electric Supply Corporation Ltd V Subhas Chandra Bose²⁰³, the appellant corporation engaged various electric contractors to carry out various electric works together with their repairs and maintenance one of the conditions of the contract was to provide competent supervision while the work was in progress by the Contractor. It was held by the Supreme Court that the employees appointed by the contractors i.e. immediate employers would not become employees under the appellant corporation i.e. the Principal employer under the provisions of this Act,²⁰⁴ because the work done by the employees was under the exclusive supervision of the electric contractors or competent supervisors engaged by them under the term of contract. The Court was of the view that consistency in vigil is

200 H.S.pandey Contract Labour and Social Security Legislations in India, 36 JIL1 (1994) p 209

201 (1985) Lab IC 279 (ver)

202 Id at 282

203 (1992) Lab IC 332 (SC)

204 The Employees State Insurance Act 1948

necessary and a mere right of checking of work after its completion and rejecting or accepting the work on scrutinising compliance with job requirement would not constitute supervision of the appellants corporation i.e., principal employer²⁰⁵

In Employees State Insurance Corporation V G N Mathur, Technical Director, Elphinstone Spx and Wvg Mills Ltd²⁰⁶ the Bombay High Court held that person nominated as 'occupier' under section 100 (2) of the Factories Act 1948 but not having ultimate control over affairs of the factory is not 'Principal employer' as contemplated under section 2 (17) (1) of the Employees State Insurance Act, 1948

- f) Bonded Labour and Social Security : In spite of the provision in Article 23 of the constitution, the practice of Bandhla (Bonded) Labourers continued in India unabated. This type of labourer because of some loan and customary obligation to confine to that creditor employer as labourer till the loan is repaid, makes the practice a machination for entrapping labourers and to exact work from them under intolerable and inhuman conditions. This is virtually the practice of servitude. To end all this in view the Bonded Labour System (Abolition) Act, 1976 was enacted which enjoins not only making of these bonded labourers free but also their rehabilitation. Section 10 of the Act

The role of Supreme Court in giving social justice to these poor ignorant and unfateful lot of teeming workers is laudable through the Public Interest litigation

205 ibid at 341

206 (1993) Lab 1C 1867 (Bom)

In Bandhua Mukti Morcha V Union of India²⁰⁷, the direction given by the Supreme Court not only released bonded labourers in the stone quarries in Faridabad to whom it was intended but also secured freedom from bondage to similarly placed labourers all over the country

In Mukesh Advani V State of MP²⁰⁸ the Court appointed the District Judge to inspect state mines of Mandsaur District of Madhya Pradesh to ascertain the existence of bonded labourers and their living and working conditions. On the report of the District Judge the court ordered the liberation of bonded workers

Recently In Bandhua Mukti Morcha V Union of India,²⁰⁹ the anguish of the court was clear because the State of Haryana was not acting satisfactorily on the directions of the court in the earlier decision some eight years back regarding the liberation of bonded workers at the quarries of Faridabad

The Court observed that "though some eight years back this court has in clear terms laid down the guidelines and called upon the public authority to take charge of the situation and provide adequate safeguards"²¹⁰ and the court gave further directions to secure the freedom of bonded labourers and their rehabilitation

Justice Gulab Gupta has very aptly commented that "what could not be achieved by the entire machinery of the central and state governments said to be working for the benefit of the labourers was achieved by the process of the court"²¹¹

207 AIR 1984 SC 802

208 AIR 1985 SC 1363

209 AIR 1992 SC 38

210 ibid

211 Justice Gulab Gupta "Public Interest Litigation As An Instrument of Social Justice" 1992 (V) CLQ p 108

- g) Occupational Diseases and Social security Section 3 (2) of the workmen's compensation Act 1923 covers the welfare of workers after contracting an occupational disease treating it as an accident arising out of and in the course of employment and as such giving them proper compensation. The Employee's state Insurance Act, 1948 also covers sickness benefit, Disablement benefit and Medical benefits in addition to other benefits.

There are certain occupations which cause disease because of vicinity of the workers to the exhalations of gases, petrol, dust particles, dirty air, excessive hot temperature etc. To provide relief to the workers the above enactments have provisions ²¹²

Anand Bihari V Rajasthan State Road Transport, Jaipur ²¹³ is a case wherein the Supreme Court virtually legislated the rate of compensation commensurate with length of service of a workman in case he becomes the victim of an occupational Disease or disability giving a new dimension to clause (c) of section 2 (oo) of the Industrial Disputes Act, 1947, enlarging the effectiveness of said clause. In this case, the services of the drivers of the buses aged over 40 years, were terminated by the corporation on the ground that they developed a weak or sub-normal eye-sight or lost their required vision as drivers.

The termination was challenged on the ground that it amounted to 'retrenchment' and since formalities of retrenchment were not complied with the drivers should be reinstated with full ~~backwages~~ backwages. Moreover, the petitioners claimed that there was an

212 See Section 3 (2) of workmen's compensation Act 1923 and section 46 of Employees State Insurance Act, 1948

213. (1991) Lab IC 494 (SC)

agreement whereby the corporation was to provide an alternative job in case drivers became unfit

The Supreme Court found that the case is covered by clause (a) of section 2 (oo) of Industrial Disputes Act, 1947 and is not retrenchment. The ill health was interpreted from the point of view of consumers of the concerned products or services

" If on account of a workmen's diseases or incapacity or disability in functioning, the resultant product or the service is likely to be affected in any way or to become a risk to the health life or property of the consumer, the disease or incapacity, has to be categorised as ill health for the purpose of clause (c) of section 2 (oo) "214

The Scope of Employee's State Insurance Act 1948 and the workmen's Compensation Act 1923, were also referred and it was observed that -

" The case of sub-normal eye sight or loss of required vision to work as a driver would be covered by the provisions of (ESI Act), as employment injury or as an occupational disease for no provision is made therefor compensation for a disability to carry on a particular job "215

The remedy to workers was given by formulating a scheme by the Supreme Court itself by providing alternative job together with retirement benefits on graded scale according to the length of service put in by the workmen

The aforesaid judgement is a landmark in the development of labour laws for the reason that it has formulated a scheme for compensation relief to safeguard the interest of such workmen who

214 ibid at 498

215 ibid at 501

have to face premature termination of service on account of disabilities contracted from their job ²¹⁶

E Judicial Activism : Public Interest Litigation in Industrial Employment

Aftermath of emergency of 1977-78 brought a realisation among the Judges to visualise the plight of millions of Indians who were devoid of judicial protection because of cumbersome and financially burden some court procedures and delayed disposal of cases. So device of Public Interest Litigation ((PIL) was resorted to as an instrument to ensure even handed justice to the poor, ignorant and down trodden who were neglected for long All normal procedures are by passed for the initiation of litigation through PIL" ²¹⁷ The Trio Supreme Court Judges Justice P.N.Bhagwati, Justice Krishna Iyer and Justice D.A. Desai were the pioneers of this revolution of dispensation of justice, treating even a postcard about the sufferings of victims as a writ petition by passing the Locus Standy rule and gathering the required information through their own appointed commissioners

The latest trend as pointed out by Justice Gulab Gupta is - " 'Public interest' and 'social interest' which were the prime motivating factors seem to have lost importance and courts are now promoting litigation probono publico or for the benefit of the public " ²¹⁸ But in Subhas Kumar V State of Bihar ²¹⁹ the Court dismissed the petition only because the petitioner was acting for

216 Dr Srivastava, Suresh C : "Judicial Legislation For Compensatory Relief of Workmen Exposed to occupational Disabilities" 34 JILI (1992) p. 313.

217. Dr Raghunath Patnaik : "Public Interest Litigation - A Trend setter for Social Justice" AIR 1994 J.S p 186

218. Justice Gulab Gupta : "Public Interest Litigation AS An Instrument of Social Justice" 1992 (v) CILQ p 78.

219 AIR 1991 SC 420.

his personal gain

The coverage of subjects under the PIL is versatile and almost every aspect of human affairs have been dealt with under this device

In People's Union for Democratic Rights V Union of India ²²⁰ a letter was addressed by the petitioner organisation describing the plight and suffering of women workers, child workers and male workers coming from different parts of the country employed in various construction works on less than minimum wages and other pitiable working conditions, Violating labour laws at the site of Asian Games (Asiad) at New Delhi. The law laid down by the Supreme Court in this case may be summarised^{as} follows -

- i) That the construction work was 'hazardous employment' within the meaning of Article 24 of the constitution so no child below the age of 14 years can be employed in the construction industry
- ii) That Employment of workers on less than minimum wages amounts to employment of forced labour prohibited under Article 23 of the constitution
- iii) That non payment of equal wages to men and women violates constitutional guarantee of 'Equality' mandated under Article 14 of the constitution

The court also pointed out that though the contractors employin the workmen were directly responsible, the Union of India Delhi Administration and the Delhi Development Authority could also not avoid their constitutional obligation to the workers

Again in Janjit Roy V State of Rajasthan²²¹ where the workers were paid less than minimum wages relating on Rajasthan Famine Relief works Employment (Exception from Labour Laws) Act 1964 The Court held that this Act violated Article 23 as it permitted employment of forced labour Justice Pathak however was of the opinion that the Rajasthan Statute of 1964 was violative of Article 14 of the constitution in so far as it reduced the wages of the workers to less than minimum payable under the Minimum Wages Act 1948

In Labourers working in Salal Hydro Projects V State of J K,²²² the Supreme Court once again following its decision in Asiad case held that no child below the age of 14 years could be employed as it violated constitutional mandate of Article 24 The Court directed the Central Government to enforce the constitutional prohibition and persuade the workmen to send their children to a nearby school and all expenses in respect of school fee books and Transportation were to be borne by the Central Government

M.C.Mehta v State of Tamil Nadu²²³ is a case where Supreme Court came into action because of a complaint that exploitation of child labour by the owners of match factories of Shivakasi in Tamilnadu was rampant in wide proportions The court relying on Article 39 (f) and Art 45 of the constitution directed implementation of the Minimum Wages Act and other facilities under the labour laws to the children It also directed for insurance of such children and

221 AIR 1983 SC 328

222 AIR 1984 SC 117

223 AIR 1991 SC 417

appointed a committee consisting of District Judge and District Magistrate together with a public activist of the area to oversee the proper implementation of the directions given by the Court

Thus we see that the Supreme Court has been doing a lot for betterment of the poor and exploited labour but a lot still remains to be done. It has been rightly observed that —

" The story cannot end here. It had barely begun. It is becoming as complex as it is challenging. Taking to its limit PIL attacks Traditional jurisprudence in vastly exciting ways to challenge the existing expressions of individual and social entitlement. Most importantly it enables 'La' to be an instrument of struggle and counter oppression "224

F. Summary After the goal of social justice set in the constitution, the impact of industrial revolution and developmental expansion of the country needed welfare labour legislations to ensure industrial peace and this was effectively done to cover a varied area. But mere enactments could not bring about the desired results. The results of the legislation reach the people in the form as they are actually applied and administered by the Courts. Therefore the role of judiciary as agent of dispensation of justice and as interpreter of the legislation becomes important. After independence the aspirations of the people in our country has been very high and fortunately the role of judiciary as compared to Executive in responding to the people's aspirations have been very encouraging. Judicial decisions have done miracle in improving the lot of wage earners and in compelling the employers to change their attitude towards the labour

224 Rajeev Dhavan "Law As Struggle Public Interest Law in India"
36 JIL (1997) p 338

It has been seen that during the last decade (1984-1994) that the quantum of litigation all over the country right from Industrial and Labour Courts, High Courts and to the Supreme Court has been Tremendous, showing the awareness of workers to their rights and knowledge that it is only the courts which helps whenever there is lapse or bias or evasion in implementation of labour welfare legislations by the Executive or industrialists. The Judiciary on its part has been upto the mark and has not tolerated any injustices. One cannot deny the creative and activist role of Judiciary over and above the primary role of dispensation of justice.

CHAPTER - VIII

CONCLUSIONS RECOMMENDATIONS AND
SUGGESTIONS

Conclusions

Denial of Social Justice to any section of a society leads to heart burning and unrest in any society. Therefore denial of social justice to workers is bound to result in industrial unrest. In order to ensure peace in industry the workers must be given their due share. Social Justice is the signature tune of the constitution and this note is no where more vibrant than in industrial jurisprudence.¹ As far as the industrial jurisprudence is concerned social justice not only implies equitable distribution of profits and other benefits of industry between industry owner and the workers but it also means providing protection to the workers against harmful effects to their health, safety and morality. The concept of social justice has become an integral part of industrial law. It is founded on the basic idea of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities. In the opinion of Justice Gajendra Gadkar the concept of social and economic justice is a living concept of revolutionary import, it gives sustenance to the rule of law and meaning and significance to the idea of welfare state.² The Constitution of India has also affirmed social and economic justice to all its citizens. The Constitution enshrines the concept of social justice as one of the objectives of the State. Needless to mention that sufficient provisions exist in Part III and Part IV of the Constitution that ensure social and economic justice to the people of India. However, social justice does not

1. Punjab National Bank V Gulam Dastagir AIR 1978 SC 481.

2. State of Mysore V workers of Gold Mines AIR 1958 SC 923

mean doing everything for the welfare of labour to the utter disregard of the employer. The balance of social justice leans neither side.³ Justice Gulab Gupta has very correctly opined —

" It represents the rational synthesis between conflicting claims of the employers and the employees adjusted to the interests of the society at large and embodies those ideas and principles which help securing a welfare state and egalitarian social order where all concerned get their legitimate dues and fulfil their social obligations. It therefore epitomises our faith and philosophy."⁴

For a constant industrial peace, prosperity and good production, it is essential that the relationship between the two partners, i.e. employer and employee of any enterprise, remains cordial. This is very important because they are the catalyst who activate other agents of production. Hence their relationship must be very cooperative, liberal and open-minded. Both will have to shun the path of confrontation, instead adopt progressive methods, new techniques and scientific temperament to solve their problems. If any, both are equal partners in the industrial efforts. Each of them should treat the other with equal regard and compassion. Workers are not to be treated as a cog in the wheels of industrial efforts. Both worker and the employer are complementary to each other. Worker should be accorded his due respect and on his part, he should treat the industry — the concern as his own mother — a feeling of involvement, moral as well as physical, because in the improvement of the industry his own improvement is destined.

3 Punjab National Bank Ltd. v. P.N.B. Employees Federation, AIR 1960 S.C. 160.

4 Justice Gulab Gupta — 'Our Industrial Jurisprudence' CII 1 Jabalpur, 1987 p. 71.

These objectives can very easily be achieved, if we care properly at the first stage of creation of the relationship of employer and employee by having a good contract of employment in format as well as in spirit and secondly by nurturing the relationship onwards after it comes into existence by proper implementation of that contract of employment and appropriately having a review⁺ mechanism after atleast 3 years to cope with future changes and reasonable demands

It is very important, as mentioned in earlier chapters also that the form and spirit of the contract i.e. service agreements play a very vital role in maintaining the harmonious relationship between the employer and the employee and this helps in promoting peace, progress and production

In India though some standard form of agreements are used by certain big employers, yet there is no uniformity. In England by contract of Employment Act, 1972 the basic elements of disputes and areas vulnerable for exploitation of workers are protected by making them uniform and in writing. The details in one copy of the agreement are legally to be provided to the workers. This ensures a continuous protection to the worker from different types of agreements at different point of time and later changes inserted in the contract of service without his concurrence.

In India it would be appropriate if a uniform format of agreement is introduced for all workers to give them a proper protection. It may be noted, that different industries in different regions require adjustment of local conditions, customs and

conventions. Further looking at the vastness of the country with different languages, customs and life styles, uniformity in a very strict sense is neither possible nor conducive to our goal hence the basic elements of disputes and items of exploitation may be covered as such and that has been endeavoured in our specimen proforma of contract of Employment ⁵

A copy of this contract of Employment must be given to the worker after both the parties have signed it. It may be registered with the office of the Registrar of Trade Unions or with the certifying office under the Industrial Employment (Standing orders) Act 1946 so that any stipulation anomalous or against the interests of the workers and employers may be excluded.

There must be a provision in the contract of employment itself for review and revision of this contract of employment after the lapse of a reasonable time say three years.

Insertion of collective agreements in the individual service contracts is moot point. In India the cult of collective bargaining and agreements as a consequence thereof, is a new development and has not been treated with the importance it deserves. As such the individual service contracts usually do not contain the contents of collective agreements. This leads to the flouting of the terms of the collective agreements with impunity. Though there is weapon of strike and stoppages in the hands of the workers, yet the time gap between the breach and call of strike becomes crucial and so to avoid this it is submitted that all beneficial terms of collective agreement must find a place through an addendum within

⁵ See Appendix A

a time schedule in the individual service contracts of each worker. A provision in the service contract itself for adding of these future collective agreements will serve the purpose, ensuring that the employer will not scuttle the beneficial impact of collective agreements.

The contracting out with certain legal bindings is to be prohibited. Certain employers while entering into the contract of employment insert a term whereby resorting to courts or non-application of the jurisdiction of a certain court or non-invocation of certain statutory provision are intended thus defeating the beneficial results of a legal provision or remedy of judicial review becomes the consequence. Foreclosing the legal remedies or beneficial impact of a statute by agreement is not permissible yet employers try to do that particularly through standard form of contracts. This is not only unethical but unconstitutional and against the public policy of a welfare state like India. This will be curbed and taken care of if the service contract is gone through the procedure of registration as already recommended.

The gospel of 'security of job' to get out of the workers their best on the plea of welfare and equal partnership of the worker with the employer in the enterprise, has been found to be a myth in Indian Context and particularly in Government managed enterprises where through division of responsibilities none remains responsible for any irresponsibility. Security of job leads to a situation where lethargy, absentism and inefficiency comes to the fore as a result of the guarantee that his job and his employment

will continue. It becomes crystal clear when we compare the working of a Government servant whose job is securely protected under Article 311 14,16 and 21 with an industrial worker who is protected with Article 14,16 and 21 of the Constitution. The remedy of reinstatement with backwages to the industrial worker is also of recent origin when by Section 11A in the Industrial Disputes Act, 1947 the labour courts/Tribunals were granted wide powers even to substitute the decision of the employer.⁶

The performance of an executive in the industrial sector is far better than the Government employee only because their job remains intact so long as their working remains result oriented. Job's security should be tagged with productivity and efficient working. Secure the job and lose the man's integrity and efficiency. The Job-security of workmen in Industrial sector should be made through making the workmen more efficient, expert and knowledgeable so that he may become indispensable to the unit. This attainment of higher standards should not come in the way of the workers intrinsic mobility by placing any bar to serve the parent unit for a period which seems unreasonable. The bond for serving the unit ~~for~~ⁱⁿ exchange for the expenses of attaining the higher standards should not be for more than 3 years.

No doubt there are a lot of legislations covering social security aspect of the industrial workers but it is an open secret that they are flouted with impunity. The employment of children below

6 Sec Hindustan Machine Tools Ltd V Mohd Usman and another (1983) 11 LLJ 386 (SC) Ram Avtar Shama and Another V State of Haryana and another (1985) 11 LLJ 187 (SC) etc

the age of 14 years even in hazardous and dangerous processes of production still continues inspite of child labour (Prohibition and Regulation) Act 1986. Similarly despite the existence of Bonded Labour System (Abolition) Act, 1976 deaths in bondage become a front page news even now in India. Women workers are still paid less than their male counter parts though Equal Remuneration Act, 1976 remains in force. The payment of wages less than the prescribed by the machinery of Minimum Wages Act 1948 is still prevalent because of the poverty of the workers.

However Indian judiciary has played a significant role in enforcing the charter of social justice ingrained in various labour legislations. Various judgements of High Courts and the Supreme Court testify this fact. Through the concept of Public Interest Litigation which is really 'social interest litigation' ⁷ The Supreme Court during the last decade has enabled a number of bonded labourers belonging to different parts of India to free themselves from the bondage. The Contract Labour was allowed to be covered with different social security legislations. The wrongful dismissals have been set aside and reinstatement ordered with backwages but judiciously keeping in view the interest of the employer also when reinstatement was not the proper remedy the worker was awarded compensation. Similarly, by adopting the notional extension of premises theory the provision 'arising out of and in the course of employment' has been widened to benefit more workers under the workmen's compensation Act, 1923. Thus here laity in the enforcement of welfare statutes was

⁷ See U. Baxi "Taking suffering seriously Social Action Litigation in the Supreme Court" in R. Dhawan et al (ed) Judges and the Judicial Power - 289-315 (1985)

depriving the benefits to the workers the judiciary has made that possible through its directions suggestions and its fact finding missions

Recommendations

To make the contract of employment for industrial workers a successful mode of achieving peace progress and production the following focal points of good relations between the employee and the employer must be settled

(a) Wage Policy - From minimum wages to fair wages and then of Living wages is the goal which as a nation claiming to be socialistic and welfare, should be our ultimate national objective. A national labour conference was held in September 1982 which recommended a national wage policy entailing -

- i) Quantum of minimum wages,
- ii) removal of disparities in the wage levels
- iii) compensation for rise in the cost of living and hazardous works
- iv) incentive for higher productivity

The Ministry of Labour, Government of India has formulated a proposal to constitute a tripartite wage committee with experts on it which will go into the various issues of the national wage Policy. The wage -cell in the above Ministry, deal with cases affecting the interest of employees in case of takeover of management nationalization and amalgamation of sick units with healthy units ⁸

8 Annual Report of Ministry of Labour, Govt of India, 1984-85 V I p.13.

The Tripartite conferences are the annual features of our system. They are more political than being objective. It is, therefore, submitted that the Ministry of Labour Government of India has tried and usually tries to formulate a national wage policy. Yet it has not come into a practical shape till date. It is gratifying that the Ministry is conscious of the problem. A national wage policy with a political will to implement it is the prime need of the day. It is hoped it will come to the fore and will be implemented.

- b) If it is found that certain employers fix the basic wages at a very low level but give enough allowances to make the total wage packet quite sizeable. This harms the workers perennially while he is in active employment as well as after his retirement, because all the calculations of other allowances are based on the basic wages and, if it is less - The lesser will be the quantum of allowances, gratuity, Pension, deduction to the provident fund etc. of the worker. It is submitted that workers should not be enticed by the allowances. Their basic wages should be fixed in tune with the wages fixed by the other Governmental or public sector industries, where the bargaining powers of the workers is greater because of their being sufficiently organised. The forces of demand and supply or the mercy of the employer will not serve the equitable cause of workers in wage fixation. The Region cum industry formula may be applied in wage fixation. The minimum wages are already declared and the rate of other progressive industries of the area/region are also available, the Labour Enforcement Officer may be entrusted to see that wages

fixed by the employer is tending to reach the progressive rate of wages fixed by other industrial units which is more than the minimum wages

- c) **Dispute Settlement** - For solution of disputes, what forum a worker should select becomes a problem "Sometimes a worker faces an uphill task of determining the authority who would come to his help. A worker employed in lime stone mine is covered by the Central Act but a worker working in lime - kiln and manufacturing lime is covered by the State Act. Till recently it was believed that workers employed by a contractor engaged for establishing an industry are not employed in that industry. Similar workers employed in Bhilai Steel Plant and engaged in expansion of their rolling mills were considered as not employed in Bhilai Steel Plant. Instances are not wanting here a worker had to spend several years only to get the decision that he was not the workman of the industry where he was actually working"⁹

that mode should be preferred under which circumstances can emerge when there is a unified labour code so that the time spent in groping as to what remedy should be resorted to will be curtailed. Action through wrong remedy incurs loss of time, money, energy etc. without providing the desired result. Further it is submitted that to curb the delay in justice through various Forums, 'Lok-Adalats' may be organised where labour commissioners Presiding Officers of industrial courts and Tribunals together with employers

⁹ Supra Note 4, p 368.

should participate to give instant justice to workers for petty and other disputes which the workers prefer to settle

Let us hope that a national wage policy and a common code on labour would emerge on the surface very early in the near future

- d) to curb the dilatory tactics in implementation of awards, adopted by the employer, it is submitted that avenues of appeals in terms of its number and places should be curtailed and a time bound decision-practice through legal provision should be evolved. The awards may itself be declared to be final or a standing Tripartite committee system may be commenced. The clearance from which for appeal purposes may be made a condition for going to higher courts in appeal. If a time bound reply from this standing committee is not forthcoming after a passage of say 3 months, it would be deemed that clearance for appeal has not been granted and the award as it is to be implemented. Though section 17B of the Industrial Disputes Act, 1947 provides for payment of the wages on the basis of last pay drawn to the worker in cases of appeal to higher courts by the employer, this is an indirect protection.
- e) Welfare Cell. The Grievance cell, catering to workers' grievances solution within the precincts of the industrial unit has become the welfare cell denoting the spirit of a welfare state. The workers have mostly two types of grievances firstly regarding payment, consisting of non-charging of or less charging of certain allowances wages or extra deduction from their wages etc., this happens because of mismanagement of the office and is purely an internal affair of the industrial unit which can very easily be rectified by the next

month through the auspices of the welfare cell. The second grievance relates to matters when the worker becomes an ex-worker. The dues which he is to be paid, its less payment or no payment or late payment form the major portion of this item. The offshoot, is regarding termination, and first appeal against it to the employer through this welfare cell. If properly nurtured may minimise many mishappenings.

All big industrial units and some medium size industrial units having a progressive outlook maintain welfare cell at least to counter the activities of trade unions which also indulge in welfare activities of the workers as an item of their charter of demands. Every welfare cell should be dynamic and progressive and should treat the solution of disputes as its mission and motto. The Scheme of Workers Participation in Management intends to make involvement of workers in the affairs of the concern in which they work a reality so that suspicion of the workers may go regarding concealing of facts by the management whenever these facts are relevant for the welfare needs of the workers. Having all these objectives the scheme of workers participation in the central public sector undertakings was launched¹⁰ on 30th December, 1983. The scheme envisaged workers participation in management at the shop floor and plant level in all the public sector undertakings. The Private sector industrial employers have also been requested to adopt and implement the scheme.

10 Article 43 A incorporating workers participation in Management was inserted in 1971 through 42nd amendment in 1976 is a constitutional mandate.

Till now under the scheme the union officials have been graced with the participation in the management. This has brought in more politics than the real satisfaction. The union leaders who participate on behalf of the labour in management agencies show their ambition and keep their mouth shut against the management if anything goes against the workers. It is submitted that grassroots workers through shop floor or plant level elections separately for each unit electing their representatives from a panel of workers by again electing from amongst the representatives the required number who shall actually participate in case of any industrial concerns where the number of workers is large. If the number of workers is small the direct election would suffice. The worker who participates should continue as such for 2 years only giving place to others. Participation of a grass-root worker will be non-political in effect and his personal knowledge as to where the shoe pinches so far as the problems and difficulties of the workers are concerned would be handy to the management in reforming those defects which are irritant to the workers. The worker participation in management is anti-thesis of collective bargaining as such it must prove its mantle by truth involving the workers in the affairs of the industrial unit by a representative of the workers who feeds back the workers interest instead of glorifying his personal achievements. It is submitted that a token representation for publicity will not serve the cause of workers rather it will be in the interest of the management as a show-piece of its minority - to avoid this at least 20% of the managerial strength should form from workers participants.

- g) Post retiral problems and their redressal should be looked at from the angle of welfare and not as an unproductive burden. It is essential that workers must get their proper dues as quickly as possible, preferably on the date of their retirement itself. A sort of 'Caress' so long as they remain alive from their ex-employers will enthuse the present workers to treat the concern as their own.

Delay in payment of post retiral dues to be compensated by charging an interest of 12% per annum on the balance from the date it became due and after one year it should be recovered as arrear of revenue with 10% recovery charges through the good offices of the District Magistrate on the certificate of labour commissioner who shall dispose of an application of non-payment preferred by the worker within 3 months. A provision containing the above may be added in the Payment of Wages Act 1936.

A scheme of Pension to industrial workers in private sector is agreed upon in principle by the government. For funds a levy on production, a small subscription from the workers while they are in active service and a subsidy or grant from the government as well as from the employer may form the initial basis for its accumulation. It may be invested in Government securities as well as in various schemes of various mutual funds. Thus pension to industrial workers may be paid if there is a will to pay them pension.

- h) A Common place for steaming out pent-up Anger of the workers - Insensitive management germinates the seeds of discord. But there are workers who always remain anti-management and pollute the

good relationship of the management with the workers by their baseless but forceful instigations against the management. Thus, sometimes it leads to untoward events. Again, sometimes in spite of their best efforts, the management fails to clinch a good worker and management relationship. To know the workers' mind and to provide them an opportunity to steam out their anger it is submitted that the employer should provide a room in which his own and other managerial executives' photo or statue should be kept. Every disgruntled worker should be allowed to go inside and show his wrath, anger, difficulties, injustices etc. meted out to him describing the instances of discrimination and all other things even bad names to those whom he thinks to be responsible for the anomalous situation. He will be provided full protection and his anger will be kept confidential, has to be ensured and must be ensured to have a fruitful result of this scheme. The voice-recording system and video-camera will reveal the focal points where the management must pay attention and the system will through steaming off the anger of some stubborn trouble makers and anti-management workers normalise the whole atmosphere of the industrial unit giving an opportunity to the management to know where they are failing and how to initiate remedial measures. It will revolutionise the relationship to employers with the employees and bring in peace, productivity and prosperity provided in right earnest a sportsman's spirit is maintained and the employer gathers the courage to hear even abuses to mend a pinching shoe.

- 1) **Workers Education and Training** - The workers education has to cover two distinct areas. Firstly, the inculcation of seeds of responsibility and duty towards the fellow workers, union officials, employers and his representatives, the industry and the society itself. The Trade unionism does not mean simply demands of rights, privileges and benefits. The gospel of perennial class with the capitalists, employer - the class - struggle - is losing its relevance. Instead the cult of cooperation, friendship and construction and reconstruction is gaining grounds.¹¹ Government of India runs the scheme of workers Education all over the country to enthuse in workers the responsible trade unionism - but it has become perfunctory and has lost its edge. The scheme, it is submitted, should be rejuvenated in its content and its management. The scheme should be handled by a tripartite committee where representatives of workers, employers and the Government should pool their resources for the betterment of the workers attitude as a whole. The second sphere of training should be on the job of the worker. It may be at the unit itself or the worker may be sent outside together the knowledge and expertise concerning his job and co-nate matters. A well qualified and trained employee is a shield unto himself. His intrinsic strength, confidence and mobility to other industry or concern becomes a deterrent for the employer to treat him well. This works as a job - security² to the industrial worker.

There may be some basic educational dispensation to those industrial workers who are illiterate by arranging adult literacy

¹¹ Shattering of U.S.S.R. and unification of Germany is the evidence of - thinking current globe over

workers camps of seven to fifteen days duration where workers should be allowed to participate with full wages at a gap of 6 to 12 months Refresher and safety courses may also be arranged

- j) Work- Culture and work Ethics : Every sort of education, training, participation of workers in management, efforts for industrial growth and productivity fails to give optimum results because of lack of work culture and ethics in industrial workers The greatest crisis through which the nation is going through is the crisis of character and that includes - 'no work - full pay' formulae adopted by the industrial workers in industrial sector How to exact work out of the workers, is the greatest problem before an industrialist employer Different means in the shape of bonuses, productivity-linked wages etc have been adopted - which succeed but for a short tenure In the longrun, the workers evolve some short cuts to gain the benefits without doing the required amount of work, thus the whole hearted support of the workers never comes

The work - culture by which we mean in context to workers the able, whole hearted and efficient contribution of his might towards the production, progress and prosperity of the unit where he works In other words, it means - every worker is to perform his assigned duty diligently, properly and full time A daily progress report a diary, containing the details of tasks taken and completed have not produced the desired results because of false entries entered by the workers A moral or fear of Sin has ~~has~~ to be inculcated amongst the workers or sense of patriotism

enthused into them that they will not accept the wages of that day when they feel that they have, on that day not performed well or if they accept the wages they will perform double the size of one's daily assignment next day This is easy to say but very difficult to practise but nothing is impossible The checks, supervisions from outside are not foolproof, only something from the within can solve the impasse The spirit, as we saw during the freedom movement whereby the home spun coarse cloth 'Khadi' became very dearer not in price but in preference to foreign made precious clothes and people never hesitated even in burning them, is the need of the day The workers, like freedom fighters can impose a self discipline of nation - building by simply working faithfully to their schedule and assigned task This is possible when for a little convenience the little NETAS the so-called leaders, are not entertained by the management but a general policy for all workers is followed Some get together, Seminars, Symposiums are organised and workers are made to believe that duty is worship and worship is duty

To emphasise the points, that working diligently and dutifully will solve many a problems, all the payments promotions and benefits should be linked with the productivity of the worker This productivity as a Yard Stick may have a graded scale i.e. those who are old may be treated to have fulfilled their quota of productivity even if it is lesser than that of a younger and strong incumbent As such seniority will not feel neglected The overall efforts will be conducive to industrialist, the industry and the labour force as well Each will benefit and be happy.

- k) Place of Entertainments : To break the monotony, it becomes necessary to have some change and if that change consists of some entertainment, that inflates new vigour, strength and confidence. Periodical get togethers, showing of films, arranging of music concerts, dramas, caricatures, fashion shows, melas, and outdoor and indoor sports etc produce an impact whereby certain hidden capabilities of workers come out and his hunger for publicity intermingling and social status is fed, leading to satisfaction and a letoff from the daily morose routine. This enhances his efficiency and social interaction. His personality gets an exposure and his inherent capabilities find a source of expression.

Some industrial units arrange for sports and give encouragement to sportsmen. In inter-units competition of various sports and athlete meets, the self involvement automatically comes within the ranks of the workmen. In such events, if the sportsmen of their unit win, they become as if they themselves have won. Tata Steel is a leader in organising sports and some philanthropic services in the shape of Hospitals of general and special nature e.g. cancer, blind persons, polio etc. What we desire here, is a sort of versatility in action as well as approach to workers problems and their welfare through combined efforts of the employer and workers.

- 1) Recognition of Merit : Unrecognised merit breeds frustration. Recognition of merit improves performance, becomes a stimulator for others and generates a healthy competition for improvement and progress. The Government of India to inculcate among the

working hands initiative and innovative qualities and to grant recognition to those who proved their mettle in improving the technical processes leading to saving of fuel, time, raw material and labour etc and improving of quality durability getup and versatilitv etc have introduced 'Shram Awards' on the pattern of Bharat Ratna and Arjun Awards For private sector chamber of commerce and Industry should come forward and Enthuse the work force of private sector industries as well to show off their best efforts and results The money may be collected from the employers, Trade union and the respective social welfare department and the Ministry of Labour at State and Central level both The recipient of award should be accorded facilities for further research and development with some more post-retiral monetary benefits

Suggestions

After independence, through five years plans, the development and progress of the country was chartered wherein the place of industrial contribution was very significant To keep the wheels of production moving the relationship between the workers and their employers must be cordial and smooth For this very purpose, legislations were enacted, when there was a need, on adhoc basis trying to be a self contained piece The result has been that there are plethora of enactments defining the same term and expression to suit one's own purpose The terms 'wages', worker ~~worker~~, workman, employee, perennial worker, seasonal worker, casual worker Badli worker etc have been defined differently in different enactments This breeds confusion, when over all view of labour laws is taken for dispensation of justice and extending of welfare measures to workers

The positive attitude of employer to treat the workers humanely and with dignity the response of the workers to their responsibility, the dynamic social system giving proper regard to democratic norms and rule of law capable of easy and speedy redressal of grievances make a long way to build an edifice of a vibrant, socially acceptable labour jurisprudence. Though, the labour statutes are ad-hoc, varied and deficient, yet all these numerous enactments have sought to distribute social justice at their level.

The enforcement machinery of all these beneficial welfare enactments is in the hands of bureaucrats, who function with their own style, the result is that without the direction of a competent court, nothing moves. The government functionaries specialise in shifting and escaping from the responsibilities they are supposed to shoulder. The social active groups may also be associated with implementation machineries so that through media the progress of implementation of a given labour welfare statute may be gauged.

" A unified system of administration of labour justice is really dependent on a uniform labour code for the country. Labour laws differ not only in their conceptual conception, but also lack clarity of purpose. They are cumbersome and difficult to apprehend. A uniform labour code containing not only the procedural law but also substantive provisions on almost all branches of this jurisprudence would go a long way in administering justice in a just and fair manner."¹²

12 Justice Gulab Gupta & *Our Industrial Jurisprudence*, CIL, Jabalpur, 1987 p 369-70.

So long as a unified labour code is not forthcoming, though the Labour Relations Bill consolidating several enactments has been introduced in the Parliament several times since the last decades without results, let us try to reform the present enactments wherever they seem deficient or out of the tune of present needs

i) Industrial Disputes Act, 1947 : This is an enactment which gives solace to workers by solving their disputes through machines provided therein, but the term 'workers' escapes proper description it should have found a wide scope covering all sorts of descriptions denoting this living machine There should be a comprehensive understanding that every one who shares his responsibilities in production, distribution, sales, service, repair and maintenance should be treated as worker irrespective of his wages Only those who are directly involved in management should form a separate category and those workers who participate in management will still be a worker, unless promoted on a permanent footing to the managerial rung By putting a bar of Rs.1600/- P.M. as wages and designating him ornamentally as manager and the like but actually taking duty of a worker, so that drawing of more than that would deprive him of many a legislative labour law's benefits seems a colonial trapping which must not have any place in a democratic socialist India.

The problem of casual labourer also needs solution. Since they are handy, cheap, easy to manage and that too at daily rate wages many employers prefer to maintain them in more than

reasonable numbers in contrast to the number of permanent workers at their units. The higher the percentage of casual workers to the total workforce, the greater will be the extent of exploitation because he is paid less, he is economical, moreover, the employer gets an opportunity to 'hire and fire' without observing any procedure of fair play and reason with impunity inflating his ego to be an Employer.

The employer is tempted to employ casual labourers because of above reasons - thus causing injustice, exploitation and flouting of the spirit of the industrial laws. To curb all this, it is suggested that the percentage of the casual labourers to the permanent workforce of a given unit at a given time should not be allowed to exceed from 5% to 10%. In case the need be to employ more than the number permitted, the excess number should be converted into regular and permanent employees within 6 months.¹³ Thus allowing them all the benefits of industrial and labour laws and 'equal pay for equal work'. Violation of this situation to be treated as unfair labour practice and the employer may be penalised by adding a new section 31(2) and renumbering the present section 31(2) as 31(3) of the Industrial Dispute Act, 1947. The penalty may have 6 months rigorous imprisonment as monetary penalty is of no effect, because they very easily pay it.

To cope with artificial causing of 'Break in Service' of these casual labourers and a fake service certificate of a continuous

13 See Surinder Singh V Engineer in Chief C.P.W.D., AIR 1986 SC 584

240 days or 240 days in a year¹⁴ etc the system of service-cum-identity card issued from the labour office and the entries to be filled in by the employer to be verified by the officials of chamber of Commerce and industries, has to be introduced. A casual worker who completes the required number of days of working if found otherwise fit to be retained may be per convention/statute, regularised in the every quarterly review by the committee/panel arranged by the commissioner of labour/Enforcement Labour Officer and the employers. This will ensure that the employer is getting his supply of labour adequately with proper costs.

- l) Workmen's Compensation Act, 1923 This act requires an amendment to bring an employer under statutory obligation to retain in service a workman, who has suffered partial disablement consequent on an employment injury, suited to the ability of the worker on last wages drawn when the accident occurred. In case of permanent total disablement or death consequent to an employment injury over and above the due compensation, the spouse or one of the children of the workman may be given a suitable job on compassionate grounds by the employer in whose employment the injury or death of the worker occurred. Section 3 - A detailing above suggestions may be added in the workmen's Compensation Act, 1923

- .i) Factories Act, 1948 How far the provisions of this Act are being followed and implemented by the factory owners, the Act itself provides inspection machinery under section 8. This machinery is a replica of 'Inspector Raj' wherein the government hears, sees and

14 Surendra Kumar Verma V Industrial Tribunal (1981)
1 Lab LJ 386 (SC)

does everything through Inspectors, which as the time passes breeds corruption. This machinery should be four pronged having two representatives of the Chief Inspector of the Government three from the employers, three from the workers and three from the social organisations recognised by the State Government. This machinery may be called 'Factories Inspection Panel' the each member of which having the powers and duties of chief Inspector of Factories throughout the State but all alone any member will not inspect any factory. The new sub section may be (5-A) of section 8 of the Factories Act.

Employees State Insurance Act, 1948 : This Act needs an expansion of its application to all employees and workers employed by any factory including seasonal factories and Contract Labour, (where permitted) by amending section 2 (4) of Employees State Insurance Act, 1948 so that all principal employers may contribute to the Employees State Insurance Corporation.

Equal Remuneration Act, 1976 prohibits discrimination in payment of salary among the opposite sex workers i.e. in between Male and Female workers there should be no discrimination in their remuneration but discrimination in between Male and Male and Female with Female in remuneration may continue and 'equal pay for equal work' principle has not been properly accommodated in the Act. By an amendment the Act should be made purvasive enough to cover all sorts of discrimination in payment of remuneration for the same kind of job. Though the mandate of Directive principles of State policy under Article 39 (d) exists but if a statute has been enacted it may have wider application and potentiality of eradicating the evil.

vi) Bonded Labour System (Abolition)² Act, 1976 The responsibility of implementation of this Act has been put on District Magistrates who barely find anytime to devote in rescuing the bonded labourers. It is suggested that section 10 of this Act should be so amended that 'recognised' social organisations may be included in the ambit of authorities specified for implementation of this Act. 'Recognition' to social organisations should be accorded by the State Governments on the basis of the results of the work done during the past two years. A representative of District Magistrate with the Team of social activists may work with Esprit decorps.

vii) Inter state Migrant workmen - (Regulation of Employment and condition of service) Act, 1979

This enactment virtually protects the specie of contract labour who migrate from one State to another but does not protect the workers who migrate from rural areas to urban areas for employment within the same state. In order to bring the intra-state migrant workers within the purview of this Act Section 2 (e) of this Act defining the migrant workman should be amended and the Act should be named as 'Migrant workmen (Regulation of Employment and condition of service) Act, 1979

viii) Child Labour (Prohibition and Regulation) Act, 1986

To banish the child labour from the industrial scene it becomes pertinent to punish the employers who violate the mandate of this Act Section 14 (1) for imposition of penalties be made mandatory if the violation of the Act i.e. employment of children below

14 years of age is proved. The punishment of imprisonment should be from 1 year to 3 years as minimum and maximum count at the first offence and if the offence of employing the children below 14 years is repeated the maximum punishment of 3 years should become minimum and may be extended to 5 years. The punishment of fine from 10 thousand to 20 thousand should be raised to 50 thousand with extended limit of Rs 1 lakh. Thus sub sections (1), (2) and (3) of the section 14 of child labour (Prohibition and Regulation), Act, 1986 should be amended as suggested above.

Until a unified consolidated labour code comes into existence, by amending the present labour enactments let us try to reach the goal of social security and dispensation of social justice to those whose progress and development is overdue, i.e. our workers. To workers, the essence is work hard, keep peace and be united to assert the just demands which the employer is not conceding unjustly. To the employer, he is to be vigilant about the shortcomings and inevitable gaps between the aspirations of the workers and his capacity to fulfil them. He should treat the workers as his younger brother and should never dupe them. The employer should be sensitive and should give proper attention to the demands of the workers, if reasonable should be conceded without losing much time, if unreasonable, should be thrashed out with the workers. Escapism or procrastination of parleys with the workers will not serve the proper cause.

We are approaching 21st century with global trade and competition where in quality and competitive approach will be the rule of the day. Untrained, manual labourers will have no place. A Technology rich world, speeding towards super-industrial norms based on computer civilization aiming to build Trans-national industrial empires will reject those who fail to march with it. The workers and employers both must cooperate in improving their relations, to keep industrial peace for enhancing production, profit trade and wealth of the country so that both of them and the country itself find a pedestal to stand in the new world.

Appendix - AA Model Service Agreement

General form of terms of Employment -

Employer _____ s/o _____ Aged _____

Address _____

Employee _____ s/o _____ Aged _____

Address _____

Particulars of the terms of your Employment as at _____ 19 _____

The following particulars constitute the written statement in respect of your employment with the above named employer which began on _____ (and which forms part of a continuous period of employment which began on _____ with _____)

(No Employment with a previous employer counts as part of your continuous employment)

1. Title of Employment/post -

2 Place of Employment -

3 Remuneration - your rate of pay/wages will be _____
 per _____ paid on the _____ day of each _____
 overtime is paid for on the following basis _____

4 Hours of work - You are required to work _____ days per
 week from Monday to Friday/Saturday inclusive between the hours
 of _____ A M. and _____ P M with a break of _____
 hour Lunch and in addition you should work such overtime as may
 be required by your Employer/²Employers

- 5 Policies of leave regulations are in the office of _____ available for inspection
- 6 Age of Superannuation - 60 years depending on physical fitness including normal vision
(At the interval of 3 years/1 year physical fitness test at the cost of management to be arranged)
- 7 Sickness or injury - Regulations relating to incapacity for work due to sickness and injury (including provisions for sick pay) are available for inspection in the _____ Office
- 8 Pension/Gratuity/Provident Fund - Your Employer (does not) operate (s) a pension/gratuity/provident fund scheme applicable to your employment (Details of statutory Provident Fund and Gratuity schemes together with voluntary Pension Scheme are available for inspection in the _____ Office) A Contracting out certificate is (NOT) in force in respect of your Employment
- 9 Notice -
 - a) You are obliged to give a minimum period of _____ notice to terminate your employment
 - b) Except when your employer is entitled to dismiss you summarily you are entitled to receive a minimum period of notice _____ for termination of employment contract (The period depending upon the type of Employment and its Length)

- 10 Disciplinary Rules — A copy of the Disciplinary Rules/Certified Standing orders under Industrial Employment (Standing Orders) Act 1946 applicable to your employment is available for inspection in the _____ office In the first instance you can apply orally/in writing to (The Foreman/Supervisor/Leading hand of your department) if you are dissatisfied with any disciplinary decision relating to you
- 11 Regressal of Grievances — Details of procedure available in cases where you have grievance in connection with your employment for inspection in the _____ office Any grievance should in the first instance be raised orally/in writing with Foreman/Supervisor/Leading hand/Immediate Superior of your department
- 12 Additional particulars are as below —
- a) Period of Probation _____
 - b) Enticement^{*}Bonus over and above the statutory bonus _____
 - c) Leave Travel Concession _____
 - d) Educational assistance to children _____
 - e) House accommodation furnished/unfurnished _____
free/on rental of _____ percent of basic wages/pay
 - f) Medical care for self/family _____ free/nominal charge
 - g) Uniform of _____ set(s) with washing allowance
after a gap of _____ years (s)
 - h) Incentive/day/double shift Transport from _____ to _____
 - i) Canteen facilities on subsidised/without profit/nominal profit rates _____

- 13 A copy of the agreement to be provided to the worker
- 14 All future collective agreements to find a place as an addendum

NOTE

The documents which are referred to as available in _____ office are open to inspection at any time during normal working hours are prone to amendment from time to time and future changes, if any, will be recorded in them accordingly

Dated

Signed

(Seal)

Company Secretary/Employer

Acknowledgement by Employee

I agree that the preceding provisions including those contained in the documents referred to (as varied from time to time) form the basis of my contract of employment and acknowledge receipt of a statement of which the foregoing is a True Copy

Dated this _____ day of _____ 19 _____

Signed

(Employee)

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